Supreme Court, U.S.
FILED
OCT 25 2001
OFFICE OF THE CLERK

No. 01-520

In The

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioner,

v.

STATE OF WISCONSIN and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION

JAMES E. DOYLE
Attorney General

JOANNE F. KLOPPENBURG*
Assistant Attorney General

Attorneys for Respondents
State of Wisconsin and
Wisconsin Department of
Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227
*Counsel of Record

QUESTION PRESENTED

The State of Wisconsin Department of Natural Resources denied R.W. Docks' applications to expand its 201-slip marina by dredging and adding 71 slips, in order to protect an environmentally sensitive natural resource and to prevent interference with the rights of neighboring riparian owners. R.W. Docks enjoyed the full economic use of its marina, and the present value of R.W. Docks' riparian property and improvements was $10 million. R.W. Docks did not own the lakebed below the marina and had only the riparian right of reasonable access to the water in which the marina was placed, subordinate to public rights in that water under the public trust doctrine. The question presented is whether the State of Wisconsin took R.W. Docks' property in violation of the state and federal constitutions when it denied R.W. Docks' applications for permits to dredge and build on the State's property.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT 1

ARGUMENT 7

CONCLUSION 16

CASES CITED

Andrus v. Allard,
444 U.S. 51 (1979) 14

Att'y Gen. ex rel. Becker v. Bay Boom
Wild Rice & Fur Co.,
172 Wis. 363, 178 N.W. 569 (1920) 10

Boorman v. Sunnuchs,
42 Wis. 233 (1877) 7

College Sav. Bank v. Florida Prepaid Postsecondary,
__ U.S. __, 119 S. Ct. 2219 (1999) 9

Delaplaine and another vs The C. & N.W. R'y Co.,
42 Wis. 214 (1877) 8

Diana Shooting Club v. Husting,
156 Wis. 261, 145 N.W. 816 (1914) 11, 12

Diedrich v. The N.W.U. R'y Co.,
42 Wis. 248 (1877) 8, 9

Dolan v. City of Tigard,
512 U.S. 374 (1994) 14

Franzini v. Layland,
120 Wis. 72, 97 N.W. 499 (1903) 12

Gillen v. City of Neenah,
219 Wis. 2d 806, 580 N.W.2d 628 (1998) 10, 12

Hawkins Point Lighthouse Case,
39 F. 77 (1889) 8

Hixon v. Public Service Comm.,
32 Wis. 2d 608, 146 N.W.2d 577 (1966) 10, 12

Illinois Central Railroad v. Illinois,
146 U.S. 387 (1892) 8, 9, 12, 13

Just v. Marinette County,
56 Wis. 2d 7, 201 N.W.2d 761 (1972) 10

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 11

Loveladies Harbor, Inc. v. U.S,
28 F.3d 1171 (Fed. Cir. 1994) 14

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 6, 7, 11, 13, 14

Mariner v. Schulte,
13 Wis. 775 (1861) 9

Marks v. U.S.,
34 Fed. Cl. 387 (1995),
affirmed 116 F.3d 1490 (Fed. Cir. 1997) 11

Mayer v. Grueber,
29 Wis. 2d 168, 138 N.W.2d 197 (1965) 10

Muench v. Public Service Comm.,
261 Wis. 492, 53 N.W.2d 514,
55 N.W.2d 40 (1952) 10, 11, 12

Palazzolo v. Rhode Island,
__U.S.__, 121 S. Ct. 2448 (2001) 6, 7, 13

Palm Beach Isles Association v. U.S.,
208 F.3d 1374 (Fed. Cir. 2000) 11

Penn Central Transportation Co. v. City of New York,
438 U.S. 104 (1978) 6, 14

Concrete Pipe & Prods. v. Constr. Laborers Pen.,
508 U.S. 602 (1993) 7, 14

R.W. Docks & Slips v. DNR,
145 Wis. 2d 854,
429 N.W.2d 86 (Ct. App. 1988) 3

Reuter v. DNR,
43 Wis. 2d 272,
168 N.W.2d 860 (1979) 10

Scranton v. Wheeler,
179 U.S. 141 (1954) 8

State ex rel. Chain O'Lakes Protective Ass'n v. Moses,
53 Wis. 2d 579, 193 N.W.2d 708 (1972) 10

State v. Bleck,
114 Wis. 2d 454, 338 N.W.2d 492 (1983) 10

State v. Deetz,
66 Wis. 2d 1, 224 N.W.2d 407 (1974) 12

State v. Trudeau,
139 Wis. 2d 91, 408 N.W.2d 337 (1987) 8, 12

Wis. Environmental Decade, Inc. v. DNR,
85 Wis. 2d 518, 271 N.W.2d 69 (1978) 10

Zealy v. City of Waukesha,
201 Wis. 2d 365, 548 N.W.2d 528 (1996) 10

WISCONSIN STATUTES CITED

Wis. Stat. ch. 30.....13

Wis. Stat. § 30.03 13

Wis. Stat. § 30.12 2

Wis. Stat. § 30.20 2

Wis. Stat. § 30.294 13

CONSTITUTIONAL PROVISIONS

Wis. Const. article IX, § 1 9

No. 01-520

In The

Supreme Court of the United States

R.W. DOCKS & SLIPS,

Petitioner,

v.

STATE OF WISCONSIN and WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESPONDENTS' BRIEF AND APPENDIX IN OPPOSITION

STATEMENT

1. R.W. Docks & Slips is one riparian owner of 1,100 feet of frontage, and a developer of a private 201-slip marina adjacent to that frontage, in an environmentally sensitive and valuable portion of Lake Superior. Complaint and Answer, ¶¶1,5; R-Ap. 38a-39a, ¶¶2, 5-10; R-Ap. 4a-9a.

R.W. Docks began developing the marina in 1969, when it received its first permit to construct the breakwater for its planned marina. R-Ap. 45a. This first permit for a dredging contract expressly stated that "the granting of this dredging contract is not to be construed as an assurance that the application for a structure at this location will be granted." R-Ap. 65a-66a. In 1971, the Department of Natural Resources discovered that R.W. Docks was removing and depositing materials from and on the bed of Lake Superior in violation of Wis. Stat. §§ 30.20 and 30.12.[1] R-Ap. 52a-53a. Those violations were resolved with payment of forfeitures and notice that existing and future construction was subject to both permitting provisions: "The Department shall not, however, be precluded from reopening this proceeding upon complaint . . . if the necessary permits are not obtained to legalize the already completed construction, as well as any future construction." R-Ap. 53a.

A permit to construct the breakwater was issued on March 10, 1971, at the same time that another breakwater structure was rejected as not meeting statutory standards. R-Ap. 23a. The 1971 permit specified it applied only to the specific structures in the breakwater plan and 2 boat ramps, and expired in two years. R-Ap. 23a. A 1972 permit to place a solid pile quay structure on the bed of the lake, "to create a harbor for the mooring of boats," was similarly limited, and provided that the permit could be amended or rescinded if the

---

[1] Wisconsin Stat. § 30.12 provides that no material may be deposited or structure placed on the bed of a navigable water without a permit, and that permits may be issued for a deposit or structure only "if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest." Wisconsin Stat. § 30.20 provides that "no person may remove any material from the bed of any navigable lake or from the bed of any outlying waters of this state without first obtaining a contract" that is consistent with public rights and protects the public interest.

structure became a material obstruction to navigation or detrimental to the public interest. R-Ap. 67a-68a.

R.W. Docks experienced economic problems in 1972-75, lost the marina in 1976, and repurchased the marina in 1977. R-Ap. 24a.

On January 10, 1983, R.W. Docks applied to the Department of Natural Resources for a contract to dredge 20,000 cubic yards of material from the bed of Lake Superior. R-Ap. 28a. The department expressed concern over the environmental impacts of the proposal, and after discussions between the department and R.W. Docks, R.W. Docks separated its application into two applications, one to remove 5,000 cubic yards and one to remove 15,000 cubic yards. *Id.* In June 1983, the department approved the application to remove 5,000 cubic yards. *Id.* After additional investigation and evaluation by department staff, the department denied the application to dredge the remaining 15,000 cubic yards in a decision dated April 17, 1986. *Id.*

This 1986 denial was not a departure from previous practice, as asserted by R.W. Docks in its petition (at 7), but was consistent with the previous permit rejections, limitations and grants, each grounded on the application of statutory standards to the circumstances at the time.

R.W. Docks filed a petition for review of the 1986 denial. The Dane County Circuit Court issued a decision and order remanding the matter to the department for an administrative hearing on the merits of the application and to address issues raised in the court's opinion. R-Ap. 28a. That decision was affirmed on appeal. *R.W. Docks & Slips v. DNR*, 145 Wis. 2d 854, 429 N.W.2d 86 (Ct. App. 1988).

In 1994, R.W. Docks submitted an application for a permit to extend Dock 4 to enable construction of six additional slips. R-Ap. 55a-64a. After evaluation and public

comment, the department on June 29, 1995, issued a permit for a 44-foot extension of Dock 4 allowing only two additional slips. R-Ap. 55a-64a.

Meanwhile, on March 27, 1995, R.W. Docks submitted an application for a permit to construct Dock 5, 90 feet long with six slips. R-Ap. 1a. A hearing on both the application for a contract to dredge 15,000 cubic yards and the application for a permit to construct 6 new slips on Dock 5, was held later in 1995. R-Ap. 1a-2a. At the hearing, the application was changed to seek permits to construct an enlarged Dock 5, 408 feet long with approximately 50 slips, and to extend Dock 4 by over 200 feet with 21 additional slips.

On August 15, 1996, the Administrative Law Judge (ALJ) issued an order denying the dredging contract and marina expansion permit because the proposed dredging and slip expansion would be detrimental to public interests and would not be consistent with public rights in navigable waters. R-Ap. 14a-15a. He found that:

> Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertabrate, mussels and zooplankton communities. Dredging of this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources.

R-Ap. 6a. He found that the proposed dredging and slip expansion would destroy a rare plant, fish and wildlife habitat, reduce fishery values and fish stock, result in the destruction of a rare environmental resource with high aesthetic values, damage wetland functional values, and have significant adverse cumulative impacts on the natural and public resources of Lake

Superior. R-Ap. 39a, 6a-9a, ¶¶6-10. He also found that the proposed dock expansion would interfere with access rights of neighboring riparians. R-Ap. 39a, 11a-12a.

While the weedbed cited by the ALJ may not have "emerged" (grown up above the surface of the water) had R.W. Docks not built the breakwater, as asserted by R.W. Docks in its petition (at 3 and 7), the weedbed in its "submergent state" (below the surface of the water) and the aquatic vegetation important for fish and other aquatic life predated the marina developments. R-Ap. 5a-8a. Moreover, the permit and contract were denied also because of the adverse impact on the functional values of the wetland complex of which the weedbed (whether emergent or submergent) was a part. R-Ap. 8a-9a.

R.W. Docks sought judicial review of the order, and the Dane County Circuit Court issued a decision on May 29, 1997, affirming the order and remanding only for making findings on the issue of estoppel. The ALJ determined in an order dated September 12, 1997, that the elements of estoppel had not been proven. R-Ap. 17a-26a. The 1997 Order was not appealed to a circuit court, and the 1997 Decision was not appealed to the court of appeals.

The present value of R.W. Docks' riparian property is $2 million, and the present value of its improvements on that property is $8 million. R-Ap. 70a, ¶4.

None of the activities for which R.W. Docks sought the department's approval would occur on its own property. The activities it proposed were to dredge and construct in public waters over public lakebed.

2. It was based on these undisputed facts that R.W. Docks' taking claim was adjudicated. The trial court denied that claim for 3 reasons: 1) R.W. Docks had no protectible property interest in the additional 71 slips because under the

longstanding common law principle of the public trust doctrine the right to build these additional slips was not part of its title; 2) even if R.W. Docks had a protectible property interest in the additional 71 slips, there was no unconstitutional taking because its riparian rights to construct structures on the surface and above the bed of Lake Superior were always subject to the public trust doctrine; and 3) nor was there an unconstitutional taking because R.W. Docks retained considerable practical use of its property in that it built and sold 201 slips adjacent to that property, the property was worth at least $2 million, and no evidence was presented showing adverse economic impact resulting from the denial. P-Ap. 25-31.

The court of appeals denied the taking claim because R.W. Docks maintained reasonable use of the whole of its riparian property plus the marina, and because it assumed the risk of loss inherent in commencing a project without all necessary permits. P-Ap. 18-24. The Wisconsin Supreme Court affirmed the denial based on a combination of the reasons of both lower courts. P-Ap. 1-17.

The Wisconsin Supreme Court did not, as asserted by R.W. Docks in its petition (at 9), recognize only 2 types of regulatory taking. Rather, the court adopted this Court's recognition of at least 2 categories of regulatory action deemed to be a taking without engaging in any case-specific factual inquiry. P-Ap. 7. Consistent with this Court's decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and *Palazzolo v. Rhode Island*, __U.S.__, 121 S. Ct. 2448 (2001), the Wisconsin Supreme Court found that the permit and contract denials did not constitute either one of those 2 types of taking, because they did not effect a physical invasion of R.W. Docks' private property, nor did they deny R.W. Docks all or substantially all economically beneficial or productive or practical use of its property. P-Ap. 7.

The Wisconsin Supreme Court then applied the *Penn Central* 3-factor test, recognizing that R.W. Docks did not own the lakebed beneath its marina and had at most a riparian right of reasonable access to and use of the water in which the marina was placed. P-Ap. 8-12. Consistent with this Court's decisions in *Penn Central*, *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993), and *Palazzolo*, the Wisconsin Supreme Court declined to subdivide R.W. Docks' contiguous property and applied the test to the whole of its riparian property and the adjacent marina. P-Ap. 13-15. The court concluded that the effect of the denials on R.W. Docks' riparian rights, which are subordinate to the public trust doctrine, relative to its marina as a whole, did not result "in the sort of severe economic impact or interference with distinct investment-backed expectations as to constitute a regulatory taking." P-Ap. 17.

ARGUMENT

The petition for a writ of certiorari should be denied because the Wisconsin Supreme Court's decision does not conflict with any decision by this Court, does not otherwise present an issue warranting review, and is correct.

1. R.W. Docks faults the Wisconsin Supreme Court's insertion of the public trust doctrine into its taking analysis. The court's resort to the public trust doctrine is mandated by longstanding Wisconsin law and is entirely consistent with decisions by this Court.

The controlling rule of law is that there is no taking where a governmental action effectuates a limitation that inheres in the property owner's title as a background principle of state property or nuisance law. *Lucas*, 505 U.S. at 1027-29; *Palazzolo*, 121 S. Ct. at 2464. Decisions by the Wisconsin Supreme Court and this Court establish, beyond dispute, that the public trust doctrine is one such principle,

which bars the taking claims asserted here. It is precisely because the public trust in lakebed and navigable waters is so clearly established and longstanding, that this case does not require the Court to weigh the legitimacy and scope of a "background principles" defense.

In 1877 the Wisconsin Supreme Court stated in *Diedrich v. The N.W.U. R'y Co.*, 42 Wis. 248, 266 (1877):

> It is difficult to perceive how the riparian owner [with title to the bank only] could take right to intrude upon the public fee under the water, which he might not take to intrude upon the private fee bounding his estate upon the land side.

What R. W. Docks proposes is precisely that, to build on the property of another, the State of Wisconsin. Under the public trust doctrine, the lakebed and waters of Lake Superior do not belong to R.W. Docks, but are the property of the State of Wisconsin. The state has not restricted R.W. Docks from doing something on its own property, but has only decided that R.W. Docks cannot alter public property. R.W. Docks' claim that the state must pay for declining to give it public property, is contrary to the law established by this Court and in Wisconsin.

It is settled federal and state law that the bed of Lake Superior is not private property under the Fifth Amendment or art. I, § 13 of the Wisconsin Constitution, but is public property owned by the state. *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892) (state holds title to lands under Lake Michigan and controls the use of the water above it); *Scranton v. Wheeler*, 179 U.S. 141, 150 (1954) (*citing Hawkins Point Lighthouse Case*, 39 F. 77 (1889)); *State v. Trudeau*, 139 Wis. 2d 91, 101, 105, 408 N.W.2d 337 (1987) (absolute title to lakebeds, including the Great Lakes, passed to the state upon statehood); *Delaplaine and another v. The*

C. & N.W. R'y Co., 42 Wis. 214, 225-26 (1877) (for lakes, riparian owner takes only to the ordinary high-water mark, the state is the proprietor of the lakebed, and the water's edge is the boundary of the riparian owner's title); *Diedrich,* 42 Wis. at 248 (title of riparian owners of land bounded by Lake Michigan go to the natural shore of the lake, title to the lakebed is in the public, and rule that riparian owner's title does not extend beyond the natural shore was affirmed as far back as *Mariner v. Schulte*, 13 Wis. 775 (1861)). The right we all possess to use public lands is not the "property" of any one proprietor. *College Sav. Bank v. Florida Prepaid Postsecondary*, __ U.S. __, 119 S. Ct. 2219, 2224 (1999).

It is equally settled federal and state law that the state controls the use of the water above the bed under the public trust doctrine, and that a riparian owner's right to develop its riparian property is subordinate and subject to public rights in navigable waters. This Court so stated in 1892 in *Illinois Central*, 146 U.S. at 452-55 (a state may at any time reassert its title over the beds of navigable waters and never loses control over the waters above the beds), and R.W. Docks cites no authority to the contrary.

In Wisconsin, the public trust doctrine emanates from art. IX, § 1 of the Wisconsin Constitution. Article IX, § 1 of the Wisconsin Constitution provides that:

> [T]he river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impose or duty therefor.

As the public trust doctrine has developed, the array of public rights that it protects has expanded to include, in addition to commercial navigation, a variety of purely recreational and

nonpecuniary uses including boating, swimming, fishing, hunting, recreation, and scenic beauty. *Gillen v. City of Neenah*, 219 Wis. 2d 806, 820, 580 N.W.2d 628 (1998); *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Hixon v. Public Service Comm.*, 32 Wis. 2d 608, 619, 632, 146 N.W.2d 577 (1966); *Muench v. Public Service Comm.*, 261 Wis. 492, 507-08, 511-12, 53 N.W.2d 514, 55 N.W.2d 40 (1952).

The public trust doctrine calls on the state to protect and preserve the state's natural resources for the enjoyment of its citizens. *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 526, 271 N.W.2d 69 (1978) ("'public trust' duty requires the state not only to promote navigation but also to **protect and preserve its waters** for fishing, hunting, recreation, and scenic beauty") (emphasis added); *Just v. Marinette County*, 56 Wis. 2d 7, 16-18, 201 N.W.2d 761 (1972) (under the trust doctrine the state has an active duty not only to promote navigation and **protect and preserve navigable waters** for fishing, recreation, and scenic beauty, but also to eradicate and prevent pollution, and to **maintain the natural environmental status quo**) (emphasis added); *State ex rel. Chain O'Lakes Protective Ass'n v. Moses*, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972) (the trust doctrine sees all natural resources in the state as impressed with a trust for **usage and conservation as a state resource**) (emphasis added); *Reuter v. DNR*, 43 Wis. 2d 272, 277, 168 N.W.2d 860 (1979); *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 382, 548 N.W.2d 528 (1996) (Wisconsin has a long history of **protecting** its water resources).

The rights of riparian owners are qualified by the public trust doctrine, and are subordinate and subject to the paramount interest of the state and the paramount rights of the public in navigable waters. *Bleck*, 114 Wis. 2d at 467-68; *Mayer v. Grueber*, 29 Wis. 2d 168, 173-74, 138 N.W.2d 197 (1965); *Att'y Gen. ex rel. Becker v. Bay Boom Wild Rice & Fur Co.*,

172 Wis. 363, 375, 178 N.W. 569 (1920); *Boorman v. Sunnuchs*, 42 Wis. 233, 242 (1877).

The public trust doctrine imposes an affirmative duty on the state to protect public rights in navigable waters. It is not, as asserted by R.W. Docks in its petition at 16-17, a restriction on the state's ability to hinder navigation. To the contrary, the policy of the common and statutory law that recognizes the rights of the public to enjoy navigable waters is to be broadly and beneficently construed. *Muench*, 261 Wis. at 512; *Diana Shooting Club v. Husting*, 156 Wis. 261, 271-72, 145 N.W. 816 (1914).

The public trust doctrine is therefore broader than the federal navigational servitude (petition at 16), which may be more strictly limited to navigation. *Palm Beach Isles Association v. U.S.*, 208 F.3d 1374, 1384 (Fed. Cir. 2000). Nevertheless, the federal navigational servitude is a defense to a taking claim against a federal action that protects federal navigational interests. *Id.* at 1384; *Lucas*, 505 U.S. at 1028-29; *Marks v. U.S.*, 34 Fed. Cl. 387, 403 (1995) (citing a series of U.S. Supreme Court cases in support of this proposition), *affirmed* 116 F.3d 1490 (Fed. Cir. 1997).[2] Similarly, the public

---

[2] R.W. Docks erroneously cites to *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) to suggest otherwise (petition at 17). This Court there stated that the navigational servitude is not a defense to a taking claim when Congress "exercises its Commerce Clause authority to promote navigation." *Id.* No such exercise of Commerce Clause authority has occurred here. Moreover, the Commerce Clause authority to regulate is not a background principle of property law, inherent in one's title, as is the public trust doctrine. In *Kaiser Aetna* the owner of a private pond invested in substantial improvements, which included connecting its private property to navigable water, and thereby was made to relinquish a fundamental element of its property rights, the right to exclude. 444 U.S. at 176-181. This Court held that that forced relinquishment amounted to a physical invasion requiring compensation. *Id.* Here, by contrast, none of R.W. Docks' private property is implicated by the regulatory decisions it challenges, none of its property rights have

trust doctrine is a defense to a taking claim against a state action that protects public rights embraced by the doctrine. *See Illinois Central*, 146 U.S. at 452-5 (the control of the state for the purposes of the public trust is different from the state's title in lands open to sale and can never be lost).

R.W. Docks' assertion, in its petition at 11, that the public trust doctrine does not create legal rights misrepresents the holding in the case it cites in support. The Wisconsin Supreme Court stated in *State v. Deetz*, 66 Wis. 2d 1, 13, 224 N.W.2d 407 (1974), only that the public trust doctrine does not provide a cause of action. More significantly, R.W. Docks' assertion is misplaced—if nothing else, it is clear that the public trust doctrine limits private rights, and that limitation is an encumbrance on private title, despite R.W. Docks' unsupported assertion to the contrary, in its petition at 14.

The public trust doctrine as a public trust encumbrance on a riparian owner's title is a long-standing and widely recognized rule of property in Wisconsin. Wisconsin, "by judicial authority so long acquiesced in as to become a rule of property," quite early established that riparian title is subject to public rights by vesting title to beds in the state in trust for all the people's use. *Franzini v. Layland*, 120 Wis. 72, 81-82, 97 N.W. 499 (1903). The public trust is part of the "organic laws of our state," originating before statehood. *Diana,* 156 Wis. at 269, 271. The rights of citizens under the public trust doctrine are "entitled to all the protection which is given financial rights." *Muench*, 261 Wis. at 511-12.

The public trust rule of property law is reflected in state nuisance law. The common law nuisance of jeopardizing public rights in state waters has been codified by statutes that authorize the state to abate as nuisances activities that violate the public interest in state waters. *Gillen*, 219 Wis. 2d at 832-

---

been relinquished as a result of those decisions, and certainly no fundamental element of those rights, has been affected at all.

33; *Hixon*, 32 Wis. 2d at 616. The placement of structures in and the removal of materials from a lake are regulated in Wis. Stat. ch. 30 (which codifies the public trust doctrine, *Trudeau*, 139 Wis. 2d at 101), and have been so regulated since 1905 (despite R.W. Docks' suggestion to the contrary, in its petition at 14 and 16). A violation of that chapter is a nuisance as defined by Wis. Stat. § 30.294, and the state is authorized to abate such a nuisance under Wis. Stat. §§ 30.294 and 30.03. Under Wisconsin law and as found in the administrative and judicial decisions that upheld the denial of the contract and permit R.W. Docks sought, the use it proposed was indeed noxious, contrary to its assertion in its petition at 14. Because the denial of R.W. Docks' applications prevented a violation of the public trust and Wis. Stat. ch. 30, it prevented a public nuisance. Therefore, it cannot constitute a taking.

In sum, the Wisconsin Supreme Court's use of the public trust doctrine does not evade or abrogate this Court's taking analysis (petition at 13 and 17). Rather, that analysis does not apply to property rights not held. This Court's decisions, from *Illinois Central* to *Lucas*, and a long line of Wisconsin case law, together confirm that the public trust doctrine is a background principle of state property law that limits private property rights.[3]

R.W. Docks' complaint that this insertion of the public trust doctrine into taking analysis expands the narrow "background principle of state property law" rule in *Lucas*

---

[3] As R.W. Docks concedes in its petition at 16, this Court's most recent taking case, *Palazzolo v. Rhode Island*, __U.S.__, 121 S. Ct. 2448 (2001), contains nothing to alter this longstanding proposition. Similarly, the 4 cases from other states that R.W. Docks cites in its petition at 13, all of which concern the transfer of lakebed owned by the states at statehood, follow the public trust law set out by this Court in *Illinois Central*. The statement in *Illinois Central* that states may have to pay for improvements made under such lakebed grants, 146 U.S. at 455, which R.W. Docks notes in its petition at 13, is consistent with the public trust doctrine as a limitation on private property rights otherwise.

(petition at 14) is a tautology. The same complaint could be made of any encumbrance on private title that constitutes such a principle. What R.W. Docks is really arguing is that this Court cannot mean what it said in *Lucas*, and that this Court should take this case to liberate taking claims from the background principles of state property law that currently thwart them. To do so would be to turn state property law on its head.

2. R.W. Docks also faults the Wisconsin Supreme Court for analyzing its taking claim with respect to its entire riparian property and adjacent marina, rather than with respect to each of the 71 slips yet to be developed. The Wisconsin Supreme Court declined to follow the one federal court to consider segmenting contiguous property, under a "partial taking" theory (*Loveladies Harbor, Inc. v. U.S*, 28 F.3d 1171 (Fed. Cir. 1994)), in part because the private property right asserted here—the subordinate riparian right of reasonable access—was so limited. P-Ap. 15. Moreover, unlike in *Loveladies*, 28 F.3d at 1183, no part of R.W. Docks' marina was developed before the regulatory restrictions were in place. R.W. Docks identifies no decision by this Court that would countenance the approach it advocates in this case.

To the contrary, the Wisconsin Supreme Court's reference to the contiguous property as a whole in this case is mandated by the decisions of this Court in *Penn Central*, 438 U.S. at 130-31, *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. at 644, and *Dolan v. City of Tigard*, 512 U.S. 374, 385 n.6 (1994).[4] It is the approach suggested by R.W. Docks that threatens "the integrity" (petition at 22) of this

[4] The court's consideration of the marina as a whole also tracks this Court's suggested analysis in *Lucas*, 505 U.S. at 1016, n.7, because it is consistent with Wisconsin's law of property, as outlined above.

line of cases, not the decision of the Wisconsin Supreme Court.

Because this case involves public property, along with private rights "encumbered by the public trust doctrine and heavily regulated from the get-go" (P-Ap. 16), this case does not properly frame the partial taking issue raised by R.W. Docks in its petition. That issue, which is how and to what extent contiguous private ownership can be subdivided into separate pieces, is not presented in this case.

3. It is telling that R.W. Docks never identifies the private property that it lost, or the private property rights that were taken from it. If R.W. Docks' taking claim succeeds, then any riparian developer unlikely to obtain a permit for all it wishes to do along its property will have carte blanche to proceed with the part that will be permitted and then be compensated for the part that, ultimately, is not permitted. That result will render the permitting structure and the public trust it protects meaningless. The Wisconsin Supreme Court prevented such an absurd result and properly ruled that R.W. Docks suffered no unconstitutional taking from the permit denial, because it retained the economic benefit and use of the 201 slips and related improvements at the marina and on its riparian property, and because the effect on its riparian right of reasonable access, subject to the public trust doctrine, was at most negligible.

CONCLUSION

For all the reasons stated above, the State of Wisconsin requests that this Court deny the petition.

Respectfully submitted,

JAMES E. DOYLE
Attorney General

JOANNE F. KLOPPENBURG*
Assistant Attorney General

Attorneys for Respondents
State of Wisconsin and
Wisconsin Department of
Natural Resources

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9227

*Counsel of Record

October 2001

APPENDIX

APPENDIX

Table of Contents

Item	Page
Findings of Fact, Conclusions of Law and Order of Division of Hearings and Appeals, dated 8/19/96 (1996 Order)	1a-16a
Findings of Fact, Conclusions of Law and Order of Division of Hearings and Appeals, dated 9/12/97 (1997 Order)	17a-26a
Decision and Order of Dane County Circuit Court, *R.W. Docks & Slips v. Wisconsin Department of Natural Resources,* dated 5/29/97 (1997 Decision)	27a-44a
Findings of Fact and Permit of Department of Natural Resources, dated 5/19/69	45a-48a
Findings of Fact, Conclusions of Law and Order of Department of Natural Resources, dated 5/19/72	49a-54a
Permit Mailing List, Letter to Robert Holmgren dated 6/19/95, and Dock Permit dated 6/29/95 for R.W. Docks & Slips	55a-64a
Letter to Robert Holmgren from Department of Natural Resources dated 12/30/68	65a-66a
Findings of Fact and Permit of Department of Natural Resources dated 5/12/72 (excerpt, p.2)	67a-68a
Second Supplemental Affidavit of Robert F. Holmgren dated 8/19/99	69a-71a

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of R. W. Docks & Slips) to Dredge Material From the Bed of) Lake Superior, Town of Bayfield,) Bayfield County, Wisconsin)	Case No. 3-NW-84-101
Application of R. W. Docks & Slips) to Place Dock Structures on the Bed) of Lake Superior, Town of Bayfield) Bayfield County, Wisconsin)	Case No. 3-NW-95-04022

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

R. W. Docks & Slips, 18855 Ridgewood Road, Wayzata, Minnesota 55391, applied to the Department of Natural Resources for permits to dredge material from and construct a pier on the bed of Lake Superior in Government Lot 3, Section 22, Township 50 North, Range 4 West, Bayfield County, Wisconsin. The proposed project consists of the construction of a pier designated as Dock 5 in the Port Superior Marina. The main dock will extend into the bay for approximately 90 feet, adding approximately 50 slips to the existing marina. Further, three proposed 24 foot finger piers located on the easterly side of Dock 5 would create six additional boat slips. The main dock is eight feet in width, the finger piers are four feet in width, and both will be constructed of treated wood planks

supported by a foam-filled polyethylene float system. The pier will be anchored with oak pilings.

Further, at hearing the applicants amended their application to include the further expansion of Dock 4 as set forth below. The hearing was continued for over one month to allow the Port superior Village Association and other objectors time to prepare to respond to the amended application.

The dredging project would involve removal of 15,000 cubic yards that would extend beyond the footprint of the proposed Dock 5 expansion to permit completion of the marina as platted.

The Department of Natural Resources issued a Notice of Pending DNR Permit which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permits without a hearing. Several timely objections were received by the Department.

On August 18, 1995, the Department forwarded the file to the Division of Hearings and Appeals for hearing.

Pursuant to due notice hearing was held on September 19-20, and November 19, 1995 at Ashland and Washburn, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge (ALJ). The parties submitted written briefs and the last brief was received on June 6, 1996.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, WI 53707-7921

R. W. Docks & Slips, by

Bruce A. Rasmussen, Attorney
2116 2nd Avenue, South
Minneapolis, MN 55404

Port Superior Village Association, Inc., by

William D. Bussey, Attorney
249 Rittenhouse Avenue
Bayfield, WI 54814

Port Superior Marina Association, by

Scott W. Clark, Attorney
214 West Main Street
Ashland, WI 54806

John Maloney
Route 1, Box 218A
Bayfield, WI 54814

FINDINGS OF FACT

1. R. W. Docks & Slips, 18855 Ridgewood Road, Wayzata, Minnesota 55391, completed filing an application with the Department for a permit under sec. 30.12, Stats., to expand existing marina pier facilities on the bed of Lake Superior, Town of Bayfield, Bayfield County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in Government Lot 3, Section 22, Township 50 North, Range 04 West, Bayfield County. The above-described property abuts Lake Superior which is navigable in fact at the project site. The applicants own approximately 1100 feet of riparian frontage and place between 191 and 198 boat slips on five existing structures.

3. The applicants propose to expand the existing marina facilities as follows the main dock would be extended into the water approximately 90 feet and Dock 5 as identified on Exhibit 8 would be installed, adding 50 pier slips to the existing marina facility. Further, three proposed 24 foot long finger piers on the easterly side of Dock 5 would create six additional boat slips. (See: Ex. 8) In addition, at commencement of the hearing the applicant stated that it was also seeking to expand existing Dock 4 to include 22 more slips as contemplated in the original design of the marina. At present, pier slips 174-198 on Dock 4 have been authorized; the proposal would expand Dock 4 to include slips 199-220. (Ex. 8) The piers would be anchored with oak pilings. Said piers would be constructed of treated wood planks supported by a foam-filled polyethylene float system.

4. The project also involves a separate application for a dredging contract pursuant to sec. 30.20, Stats. The proposed dredging would involve removal of more than 15,000 cubic yards and would extend beyond the footprint of the proposed Dock 5 expansion as set forth on the plat map. The dredging contract application is before the Division upon remand by the Dane Circuit Court following a review by the Wisconsin Court of Appeals in case #87-2079 [Ex. 1, #14; See: R.W. Docks v. DNR, 145 Wis. 2d 854, 429 N.W.2d 86 (Wis. Ct. App. 1988)] The applicant originally proposed to dredge 20,000 cubic yards; the Department approved 5,000 cubic yards. The instant application relates to the remaining
15,000 as set forth in Exhibit 1, #9.

5. The applicant raised numerous issues relating to whether the emergent weed-beds in the proposed project area pre-dated the installation of the existing breakwater. The record was clear that there have long been submergent weeds in the area of the project site. Dr. Meyer was able to detect aquatic vegetation in the 1938 aerial photo of the site, although he was unable to detect whether any of these plants grew above the water line. (Meyer Depo., p. 19) Meyer rendered similar opinions regarding 1965, and 1975 aerial photos. Dr. Meyer was able to detect emergent vegetation in post-breakwater 1979, 1983 and 1990 photos. The applicant also offered the testimony of an engineer, Mr. Toro-Escobar, which suggested that the breakwater facilitated deposit of sediment west of the structure in the area which now supports a wide variety of emergent as well as submergent plants. The record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project.

However, there is no dispute that the area has long supported aquatic vegetation that has provided habitat for fishery and other aquatic life. Mr. Powers remembered fishing the northern end of the weed bed for northern pike in the 1930's. Department staff reports from 1984 reported the environmental significance of the weed bed for fish spawning, nursery, feeding and protective cover. (Exhibits 15 and 36)

While the historical development of the site is interesting, the applicant overstates the significance of the breakwater to the present balancing between public and private rights at the project site. The issue with respect to the 30.12, Stats. permit is whether it would be "not detrimental to the public interest" in navigable waters under the present circumstances. The issue with respect to the dredging contract is whether approval of the contract would be "consistent with public rights." Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertabrate, mussels and zooplankton communities. Dredging of this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources. (See: Findings 7-10)

7. Bruce Swanson, the DNR Area Fish Manager, netted and electro shocked fish in the aquatic vegetation bed that would be severely reduced if R. W. Docks is allowed to expand its structures as set forth above. In his report, Swanson concluded that granting the application for a permit would ". . .result (in) a major loss of a very unique remnant habitat in an area which previously supported much more aquatic weed beds. . ." Swanson further opined as follows: " The current bed supports at least 28 species and some in very large

abundances. These beds are very limited in Wisconsin's Lake Superior shore. This bed represents 10-20% of what now exists on Wisconsin's Lake Superior shoreline. I feel it plays a very strong role in the life history of the Pike's Creek northern pike population, which reach trophy size (10-20 lbs.). The proposed dredging of the bed would not only result in the loss of this fish oasis and its scenic beauty, but the further depletion and even the potential demise of the remnant Pikes Creek northern pike spawning population." (Ex. 47)

A clear preponderance of the credible evidence indicates that the proposed project would result in detrimental impacts to fishery values. A preponderance of the credible evidence established that the area of the proposed dredging provides important habitat for game fish, forage fish and the associated macroinvertebrates and zooplankton.

8. The aquatic plant community in the proposed project site constitutes a rare environmental resource on the south shore of Lake Superior.

Dr. Emmet Judziewicz has been working on a specific project to explore the southern shoreline of Lake Superior to assess the aquatic macrophyte communities. He pointed out, in Exhibit 31, that there are only six communities of aquatic plants similar to this one on the Lake Superior shoreline. He also noted, in Exhibit 29, that he observed the rare "delicate water milfoil" at this site and that:

> "Compared with other aquatic macrophyte communities observed. . . the community at Pikes Bay was unique and more valuable in three ways:

1. The greater number of submergent species present;

2. The presence of a rare species;

3. The exceptional "cleanness" of the macrophytes.

> Aesthetically, this community has high values. The view from a canoe down into the submergent aquatic bed is outstanding, with a green garden of pondweeds and water milfoils sharply visible through several feet of exceptionally clear water.
>
> The Pikes Bay macrophyte bed has unique floristic and vegetative features that are not, to my knowledge, duplicated elsewhere in Wisconsin's Lake Superior waters. Its partial or total destruction would represent a significant loss to the plant biodiversity of the region and the state." (Exhibit 29)

A preponderance of the credible evidence has shown that there has long been a bed of aquatic plants that are environmentally significant to the eco-system in and around the project site. It would not be consistent with public rights or the public interest in navigable waters to allow the destruction of these through the dredging of this area.

9. The proposed project would have a detrimental impact on wetland functional values in the area. DNR Area Water Management Specialist, Duane Lahti,

reviewed this project under NR 103, Wis. Admin. Code, which are the State's wetland water quality standards. Every project which may affect a wetland must be reviewed pursuant to this chapter. (See: secs. NR 103.01, 103.06 and 103.08)

Mr. Lahti concluded that this project does not meet the requirements of NR 103 and that the project, if authorized, would adversely affect the functional values of this wetland. Specifically, the project would injure fish and wildlife habitat, floral diversity, shoreline protection, and natural scenic beauty. Lahti noted further that rare mussel and plant species are also found at the site. Lahti concluded that, ". . . Dredging and dock construction would cause severe damage to the functional values of this wetland complex." (See: Ex. 41)

10. Numerous Department witnesses testified concerning the cumulative impacts which would occur on the scarce aquatic plants and habitat in Lake Superior if projects such as this are permitted. The loss of any of the few remaining intact remnant habitats would diminish the protection and preservation of Lake Superior as a natural and public resource.

11. The Department raised issues relating to the boat slip units being leased for 99 year period and offered under Chapter 703, Stats., which is the Condominium Ownership Act. The instant hearing was not noticed nor intended to address whether the existing 191 slips currently at the project site are maintained in accordance with the public trust doctrine. These matters involve significant issues relating to individual property interests and public rights and must be addressed in a separate proceeding. However, in the event that this decision is overturned upon appeal, a permit condition requiring compliance with sec.

NR 326.04(08), Wis. Admin. Code, should be established. Such a permit condition would require that all new slips be made available to the public by virtue of seasonal rental of boat slips. (Id.)

12. The proposed structures will not materially obstruct existing navigation on Lake Superior. The proposed piers are in a protected bay and outside the usual pattern of navigation on the lake. However, proposed Dock 5 would have a detrimental impact on the rights of neighboring riparians. (See: Finding 14)

13. There is a dispute over the riparian status of the applicant as it relates to the proposed construction of Dock 5. (See: Ex. 8) Port Superior Village Association, Inc. (PSVA) contends that it is the riparian owner of the land contiguous to the proposed Dock 5. PSVA does not have a deed which conveys and warrants this strip of property to PSVA. Legal title to this land instead appears to belong to Port Superior Marina Association, Inc. (PSMA) by virtue of a June 22, 1987 Warranty Deed conveyed to PSMA by Mr. Holmgren. (Ex. 52) Further, PSMA has paid taxes on the strip during the period from 1987 to 1994. (Ex. 72)

PSVA argues that it has acquired a property interest in the small riparian strip by virtue of: a.) adverse possession; or, b.) because a bulkhead line, established but not recorded, indicates that the strip of land between the bulkhead line and the quay is legally part of the lake bed and can not be relied upon by PSMA to establish riparian status. Instead, PSVA argues, the proper riparian owner is the owner of the land immediately behind the bulkhead line, namely PSVA.

The Division lacks jurisdiction to determine claims of "adverse possession," and other matters seeking an essentially equitable remedy that establishes ownership by means other than a valid legal title. These matters are properly brought in circuit court. Accordingly, the ALJ does not address PSVA's claims to own the riparian lands by virtue of adverse possession. Similarly, it is not for an administrative agency to decide the legal effectiveness of an improperly recorded bulkhead line as it relates to property rights not otherwise established by a claim of title. Further, these issues are only relevant to this proceeding in the context of whether or not the applicant has carried its burden of proof that it has riparian status sufficient to warrant a permit under sec. 30.12, Stats. The issues raised by PSVA raise legitimate concerns about the riparian status of PSMA, which is not even on record as a co-applicant for the requested permit. PSMA indicates in its brief that it supports the instant permit application. From this, it is probably safe to assume that PSMA would consent to being a co-applicant for the instant permit as it relates to the proposed construction of Dock 5.

However, the issues raised by PSVA have sufficient merit that, in the event this decision is overturned on appeal, any permit issued should require two separate permit conditions to address these concerns. First, that PSMA be made a co-applicant for the permits as they relate to proposed Dock 5; second, that the co-applicants establish by affidavit that there are no pending list pendens or other claims disputing ownership of riparian lands contiguous to proposed Dock 5.

14. The proposed construction of Dock 5 would interfere with riparian interests of neighboring riparians, specifically the lagoon access channel made use of by PSVA residents. (See: Photo Exhibit 26) This narrow channel,

approximately 40 feet wide, has long provided access to Lake Superior to PSVA condominium unit owners who moor numerous boats in the lagoon.

The applicant acknowledges that Dock 5 would have an impact on PSVA boaters, and proposes that these concerns could be eliminated by not installing pier slip units 222, 224, 226 and 228. (Exhibit 8) Further, the applicant would address the concerns of the 24-unit PSVA condominium owners by a proposal for yet more dredging of a new channel to the right of proposed Dock 5. Further maintenance dredging in the area would also be required, creating additional expense and uncertainty of access for PSVA owners.

The record as a whole indicates that Dock 5, even under the modified proposal of the applicant, would interfere with fundamental access rights of PSVA owners.

15. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

16. The proposed structures will not reduce the effective flood flow capacity of Lake Superior upon compliance with the conditions in the permit.

17. The proposed structures will not adversely affect water quality nor will they increase water pollution in Lake Superior. The structures will not cause environmental pollution as defined in sec. 144.01(3), Stats.

18. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11,

Stats., and Ch. NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny an application for a permit for the construction and maintenance of structures on the bed of navigable waterways.

2. Section 30.13(1), Stats., provides in pertinent part that:

> CONSTRUCTION ALLOWED WITHOUT PERMIT UNDER CERTAIN CIRCUMSTANCES. A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high water mark or an established bulkhead line in aid of navigation without obtaining a permit under sec. 30.12 if all of the following conditions are met:
>
> > (a) The wharf or pier does not interfere with public rights in navigable waters.
> >
> > (b) The wharf or pier does not interfere with the rights of other riparian proprietors. . ..

The proposed project does not meet the conditions necessary to allow construction of the project without a structures permit under sec. 30.12, Stats because the project will have an impact on the rights of both the public and of neighboring riparians.

3. The applicant is a riparian owner of some of the proposed project area within the meaning of sec. 30.12, Stats. However, there is some dispute as to its riparian status as to lands contiguous to Dock 5. (See: Finding 13)

4. The proposed piers described in the Findings of Fact constitute "structures" within the meaning of sec. 30.12, Stats.

5. The applicants have the burden of proof that the proposed pier structures would be not detrimental to the public interest in navigable waters. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987)

6. The applicants have not carried their burden of proof as set forth above. Specifically, there would be detrimental impacts to the public interest in fishery values, protecting and maintaining the environment for plant and wildlife in the destruction of the weed bed as described above.

7. Section 30.20, Stats., provides that no person may remove material from the bed of a navigable lake or from the bed of any outlying waters without a contract. Subsection (2) provides, in pertinent part, that:

> (2) CONTRACTS FOR REMOVAL. (a) The department, whenever consistent with public rights,

> may enter into contracts on behalf of the state for the removal of any material from the bed of any navigable lake or any of the outlying waters . . . .. (Emphasis added)

This provision clearly indicates that the department "may" within its discretion, enter into contracts if it is "consistent with public rights" in navigable waters.

The proposed dredging project would not be "consistent with public rights" because it would result in detrimental impacts to fishery values, aquatic vegetation and wildlife habitat.

8. The proposed piers would meet the design standards of NR 326.04(7), Wis. Admin. Code.

9. It is not clear that the proposed project would meet the public access requirements of NR 326.04(08), Wis. Admin. Code. If this decision is reversed upon appeal, a permit condition establishing such compliance should be established.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the proposed dredging contract and proposed marina expansion be DENIED.

Dated at Madison, Wisconsin on August 15, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS
AND APPEALS
5005 University Avenue
Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By /s/
Jeffrey D. Boldt
Administrative Law Judge

BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals

Application of R.W.Docks & Slips to Dredge Material From the Bed of Lake Superior, Town of Bayfield, Bayfield, County, Wisconsin	Case No. 3-NW-84-0101
Application of R.W. Docks & Slips to Place Dock Structures of the Bed of Lake Superior, Town of Bayfield, Bayfield County, Wisconsin	Case No. 3-NW-95-04022

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
ON REMAND FROM DANE COUNTY CIRCUIT COURT

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding were certified as follows:

Wisconsin Department of Natural Resources, by

Michael Cain, Attorney
P. O. Box 7921
Madison, WI 53707-7921

R. W. Docks & Slips, Inc., by

Bruce A. Rasmussen, Attorney
2116 2nd Avenue, South
Minneapolis, MN 55404

Port Superior Village Association, Inc., by

William D. Bussey, Attorney
249 Rittenhouse Avenue
Bayfield, WI 54814

Port Superior Marina Association, by

Scott W. Clark, Attorney
214 West Main Street
Ashland, WI 54806

John Maloney
Route 1, Box 218A
Bayfield, WI 54814

Procedural History

On August 15, 1996, the Division of Hearings and Appeals issued Findings of Fact, Conclusions of Law and an Order denying applications for a permit under sec. 30.12, Stats., to place dock structures on the bed of Lake Superior and for a contract to dredge materials near a proposed marina expansion project. On September 13, 1996, a Petition for Judicial Review was filed in Dane County Circuit Court. On May 29, 1997, the Dane County Circuit Court (the Circuit Court) issued a Decision and Order holding that "the decisions . . . denying R. W. Docks a structure permit and a contract to dredge, are supported by substantial evidence." However, the Circuit Court held that ". . . the Administrative Law Judge failed to make any findings regarding estoppel. Therefore, this case is remanded to the Administrative Law

Judge for the narrow purpose of making findings on the issue of estoppel." (Circuit Court Order, p. 19)

By its very nature "equitable estoppel" involves powers of "equity" not normally held by administrative agencies. Administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v. State Board of Health, 245 Wis. 440 (1944). Any reasonable doubt as to the existence of an implied power in an agency should be resolved against it. Kimberly-Clark Corp v. PSC, 110 Wis. 2d 455, 462, 329 N.W.2d 143, 146 (1983). The Division does not claim for itself any "equitable" powers beyond the specific statutory authority to decide if the permit and contract applications met existing statutory standards. However, given the Remand Order of the Circuit Court, the ALJ will make Findings on the equitable issues which the Circuit Court, but not the ALJ, has authority to execute.

On July 10, 1997, a telephone conference call was conducted and all parties agreed that the narrow issue of equitable estoppel be decided on the basis of existing briefs previously submitted to the Division. On August 29, 1997, the Division gained possession of said briefs. This Decision is not based upon any briefs submitted to the Circuit Court.

FINDINGS OF FACT

1. This Decision incorporates by reference the Findings of Fact, Conclusions of Law and Order dated August 15, 1996.

2. There is no evidence in the record of any action or inaction by the DNR which induced reliance by R. W. Docks or its predecessor corporation to its detriment.

3. With respect to equitable estoppel, R. W. Docks argued *in toto* as follows in its "Memorandum in Support of Applications."

> In 1968, R. W. Docks & Slips applied for a permit to construct a breakwater for the purpose of creating a sheltered harbor including the proposed dredging area. It expended the money to construct this breakwater in reliance on the permit. In 1972, after prolonged negotiations with the department, R. W. Docks entered a settlement with the Department over a dispute as to the location of the shore of the lake. The settlement required the Department to issue a permit for the construction of a structure on the bed of Lake Superior. The structure, commonly referred to as the quay, is the anchor for Docks 4 and 5 which will occupy the dredging area. R. W. Docks would not have entered this settlement agreement if it knew that the Department would seek to prohibit it from completing these docks. Thus, all of the factors required for estoppel are clearly present, under these circumstances it would be inequitable for the Department to be allowed to prevent R. W. Docks from completing the marina." (2/13/96, Brief of R. W. Docks, p. 10)

4. The original enforcement actions and permits dealt with the area where Docks 1, 2 & 3 are located and the placement of the "quay" and dredging of the lagoon. Thus, only documents in the record are the permits for the dredging and placement of the "quay", for the dredging of the PSMA lagoon and the area where Docks 1, 2 & 3 are located. See Exhibit 1-7 and the "Plates" presented with that 1972 application. The record is clear that the permission granted to the applicant and its predecessors in the late 1960's and early 1970's were limited to discrete activities and had specific expiration dates.

In 1983, the applicant approached the Department with the current proposal to dredge 15,000 cubic yards of material from the current proposed project area to place docks 4 & 5. The Department quickly notified the applicants of its objections to the proposal and has since consistently maintained that position.

5. There is no specific language cited in the record which granted the applicants a prospective, unwritten permit to place structures on the bed of Lake Superior for boat slips sufficient to moor 272 boat slips. Indeed, even if the applicants had obtained a written permit authorizing construction of slips accomodating 272 boats, which they have not, the permit would have been void if it were not completed within the time period specified in the permit or within three years if no time period were specified. (Sec. 30.07, Stats.) The eleven year period between the 1972 settlement and the 1983 applications is longer than either the statutory expiration date or the two year period found in the other permits issued to the applicants and its successors.

6. There was no evidence of anything approaching "fraud" by the DNR. The applicant asserted that it was somehow "inequitable" for the Department to settle an enforcement action against the applicants for removing materials from the bed of Lake Superior and then not later grant the applicants a permit, over a decade later, for boat mooring slips. This argument is absurd and is likely "frivolous" within the meaning of sec. 814.025(3)(b), Stats.

7. In this matter a clear preponderance of the evidence indicated that the proposed dredging and construction would result in the destruction of an important and to large extent unique bed of aquatic vegetation on the south shore of Lake Superior.

Even if the three elements of estoppel and the further element of "inequitable" fraud by the government agency

were proven, the public interest in protecting this natural resource would likely outweigh any injustice to the applicant. However, because the applicants have not developed any alleged "fraud" nor specifically shown any action or inaction of the DNR which induced reliance by R. W. Docks to their detriment, it is difficult to speculate as to the nature of the alleged injustice is which would need to be balanced against the public benefit of maintaining a rare environmental resource.

DISCUSSION

The relationship between the 1972 settlement with respect to the location of the shoreline and the instant permit applications is not developed in the Applicant's brief nor in the record. The general rule in Wisconsin is that it is not necessary to rule on issues which are not adequately developed by the party in the record or in briefs. See: Truttschel v. Martin, 208 Wis. 2d 361, 369, 560 N.W.2d 315 (Wis. Ct. App. 1997) However, in this instance the ALJ has been Ordered by the Circuit Court to develop the applicant's arguments for them.

The best statement of the equitable estoppel argument is found in the 1987 Dane County Circuit Court decision. In the October 1, 1987, Dane County Circuit Court decision (the 1987 Circuit Court decision) R. W. Docks asserted that " . . . when (the) DNR granted the permit to construct the breakwater in 1972 it was with . . . full knowledge that the marina would be constructed with a total of 272 boatslips." (The 1987 Circuit Court decision, p. 12) In the 1987 Circuit Court action, R. W. Docks further alleged financial loss which it attributed to the DNR " . . . allowing it '. . . to detrimentally rely on the initial breakwater permit.'" (The 1987 Circuit court case, quoting the petitioner's memorandum)

This argument is missing several important linkages, none of which were developed in the record. First, under sec. 30.12, Stats., a permit is required for each structure on the bed of a navigable waterway which does not meet express statutory exemptions. The breakwater was evaluated pursuant to the statutory standards and a permit to construct the breakwater was issued on March 10, 1971. (Ex. 1, #3) At that time, another proposed breakwater structure was rejected because it would " . . . constitute an extension across adjacent riparian property." (Id.) It should have been apparent to the applicants that all structures would be evaluated individually on the basis of whether or not they met the statutory standards. Further, the permit specified that it applied only to the specific structures included in " . . . breakwater plan #2 and the two boat launching ramps as described in the foregoing findings of fact." (Id., p. 4) Finally, the breakwater and boat ramp permit was limited on its face to a period of ". . . two years from the date hereof, if (the) structures are not completed before such date." (Id.)

Similar language appears in the 1972 permit to place the solid pile quay structure on the bed of the lake. That permit included the following language " . . . the authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest." (Ex. 1, # 4) In the instant applications, the ALJ found that placement of the pier structure and the proposed dredging in an environmentally sensitive area would be detrimental to the public interest in navigable waters.

R. W. Docks asserts that the breakwater permits and the 1972 settlement which led to the "quay" structure permit, somehow indefinitely granted it rights in perpetuity to build other structures, not specifically and individually evaluated in terms of the statutory standards, on the bed of Lake Superior. However, any such "reliance" by R. W. Docks was unreasonable. The testimony in the record indicates that Port

Industries, Inc. . . . "got into economic problems in '72, '73, '74 and '75 and actually lost the marina as Port Industries in '76." (TR. p. 125) R. W. Docks assumed ownership in October, 1977. Mr. Robert F. Holmgren was the principal manager in both Port Industries, Inc., and R. W. Docks and Slips. A bank failure and other events kept Holmgren from pursuing completion of the project as he had hoped during this time period. (Id.) There is no evidence in the record indicating that the Department promised either Port Industries or R. W. Docks the right to place any number of pier slips at the marina. The Department would not have had authority to make such a promise without first pursuing the public noticing requirements of sec. 30.02, Stats. As with prior applications, the rights of the public and of neighboring riparians had to be considered in processing any future permit applications.

Any "reliance" to its detriment by the applicants was misplaced and "unreasonable" as a matter of law because its predecessor corporation had direct and first-hand knowledge of the DNR's permit evaluation procedure: 1) that all structures would be evaluated individually; 2) that all permits granted were limited by specific time periods.

Pursuant to statute, the DNR serves as " . . . the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." Sec. 281.11, Stats. Pursuant to Chapter 30, Stats., the Department must evaluate discreet activities that require permits to ensure that proposed activities do not have a detrimental impact or public rights in public waters under existing environmental conditions. All of the prior permits, contracts and settlements granted to the applicants had no bearing on the likelihood of the grant or denial of the instant applications.

CONCLUSIONS OF LAW

1. An administrative agency is not a court of equity and possesses only such powers as are expressly granted to it or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. American Brass Co. v. State Board of Health, 245 Wis. 2d 440 (1944). The Division does not have authority to fashion equitable remedies and makes Findings and Conclusions in this instance by way of an extension of the equitable powers of the Dane County Circuit Court.

2. The three elements of equitable estoppel are as follows:

(1) Action *or nonaction* which induces (2) reliance by another (3) to his detriment.

In addition, the proof of estoppel must be clear and convincing and may not rest on conjecture. The Wisconsin Supreme Court has held that in order to estop the government, the government's conduct must be of such a character as to amount to fraud. The word fraud used in this context is not used in its ordinary legal sense; the word fraud in this context is used to mean inequitable:

> "The term 'fraud' used by the court is not to be construed here as it is used in the ordinary sense—as an artifice, a malevolent act, or a deceitful practice.
>
> "'The meaning here [in the application of the doctrine of estoppel] given to fraud or fraudulent is virtually synonymous with "unconscientious" or "inequitable."'

State v. City of Green Bay, 96 Wis. 26 195, 202, 291 N.W.2d 508 (1980).

The applicants have not shown any of the elements of equitable estoppel by clear and convincing evidence.

Further, even if the three elements of estoppel are proved, in order to estop a governmental entity, the court must balance the public interest at stake if the doctrine is applied against the injustice that might be caused if the estoppel doctrine is not applied. Id., p. 210

No "injustice" was demonstrated by the applicant. The public interest in maintaining a rare environmental resource would be given strong weight in any balancing of the unproven injustice and the public interest.

ORDER

WHEREFORE, the Division submits these Findings and Conclusions on the equitable estoppel issue which it was directed to consider on Remand from the Dane County Circuit Court.

Dated at Madison, Wisconsin on September 12, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS
AND APPEALS
5005 University Avenue
Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 267-2744

By: /s/
Jeffrey D. Boldt
Administrative Law Judge

STATE OF WISCONSIN DANE COUNTY
CIRCUIT COURT, BRANCH 15

R.W. DOCKS & SLIPS,

Petitioner,

v.

DECISION AND ORDER

Case No. 96-CV-2146

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Petitioner R.W. Docks & Slips (R.W. Docks), is seeking judicial review of a decision issued by respondent Wisconsin Department of Natural Resources (DNR) on August 15, 1996. R.W. Docks contends that the decision of the DNR was erroneous and violates a number of R.W. Docks' statutory and constitutional rights.

BACKGROUND

The following facts are undisputed in the record. The early history is provided for purposes of background, even though it may not be germane to the present action.

This case focuses on the further development of a marina located along the shore of Lake Superior in Wisconsin. R.W. Docks began working on the site in 1969. The marina is currently operated as a condominium—each boat slip is assigned a number and is treated as a discrete parcel of real estate. Five docks are planned, three and one half of which

have been completed. To date, approximately 201 slips have been developed and sold. R.W. Docks is seeking to develop the remainder of dock 4 and all of dock 5, and then sell an additional 71 slips.

In 1983, R.W. Docks applied to the DNR for a contract to dredge 20,000 cubic yards of material from Lake Superior. The DNR opposed this action due to environmental concerns. Eventually an agreement was reached whereby R.W. Docks broke its contract into two parts, and made an initial application to dredge 5,000 cubic yards. This application was approved. R.W. Docks' application to dredge the remaining 15,000 cubic yards was denied by the DNR on April 17, 1986.

R.W. Docks petitioned for judicial review of that decision on May 15, 1986. In a decision issued October 1, 1987, the circuit court ordered that the matter be remanded back to the DNR for an administrative hearing. The court's order also directed that certain issues be addressed at that hearing. The DNR appealed the circuit court's order. On July 21, 1988, the court of appeals affirmed the circuit court's order, with a minor modification.

The ALJ conducted a hearing on September 19-20, and November 19, 1995. The parties submitted written briefs.

On August 15, 1996, the administrative law judge issued an order denying R.W. Docks applications to dredge and to construct the new docks. R.W. Docks has petitioned for judicial review of that decision.

R.W. Docks asserts that the administrative law judge made numerous material errors of fact and law. The petitioner also asserts that the administrative law judge erred by not

ruling on all of the issues before him. Briefs have also been filed by other certified parties.[1]

STANDARD OF REVIEW

R.W. Docks has sought judicial review of an administrative agency's decision. R.W. Docks asserts that:

> There is no reason to comb the record for evidence supporting the Administrative Law Judge's Decision. The question is, rather, can the Department in the circumstances presented, deprive R.W. Docks of all economic use of its property.

Despite this assertion and pursuant to §227.57(1), Stats., judicial review is in fact limited to the record.[2] R.W. Docks did not bring an inverse condemnation claim, nor any other claim for damages pursuant to violations of either the Wisconsin or United States Constitutions. Such claims are simply not ripe. The issue that is before this court is not whether the DNR's action constituted a "taking" of R.W. Docks' property but whether the DNR's ruling is supported by substantial evidence in the record. Therefore, to the

---

[1] These parties are: the Port Superior Village Association, Inc.; John Maloney; and the Port Superior Marina Association. To the extent that any of those parties make arguments not germane to the Chapter 227 proceedings, they will not be addressed.

[2] The court wishes that the petitioner had provided more than minimal citations to the record, to the transcript, and to supporting case law in support of its various arguments. In particular, the assertion "this is not what the cases say," (Petitioner's Reply Memorandum, p. 7) is wholly unsupported—the petitioner makes no effort to provide this court with: 1) any hint of the names or citations of the cases to which the petitioner intends that remark to apply; 2) any indication of what it believes the "cases" do say; or 3) any case citations in support of its own assertions—the only two cases cited in the petitioner's memoranda are not on point to the discussion out of which this remark arose. This places an undue burden on the court to do work that is more properly that of the petitioner.

extent that any of R.W. Docks' arguments concern issues not presently before this court those arguments will not be addressed.

This action was brought by R.W. Docks pursuant to §§ 227.52, 227.53, 227.40(2)(e), and 227.57, Stats. Chapter 227, Wis. Stats., outlines the procedures applicable to the review of a final decision of an administrative agency. Statutory certiorari review is to be conducted based on the record of the proceedings below. §227.57, Stats. The court is confined to the defects appearing upon the return, and evidence dehors the record, and contradicting it, is not permitted in the absence of statutory authority. State ex rel. Grant School Dist. v. School Bd., 4 Wis. 2d 499, 504 (1958), *citing* Morris v. Ferguson, 14 Wis. 266, 268 (1861), *other citations omitted.*[3]

Agency findings of facts will be upheld on appeal if the agency's findings are supported by substantial evidence. §227.57(6), Stats.; Omernick v. Dept. of Natural Resources, 100 Wis. 2d 234, 250 (1981), cert. denied 454 U.S. 883 (1982). Substantial evidence includes such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Gilbert v. Wisconsin Medical Examining Bd., 119 Wis. 2d 168, 195 (1984), *citing* Bucyrus-Erie Co. v. DILHR, 90 Wis. 2d 408, 418 (1979).

In contrast, application of an agency's findings of fact to a statute is a question of law warranting independent review by the court. In the Matter of the Arbitration among Madison Landfills Inc. v. Libby Landfill Negotiating Comm., 179 Wis. 2d 815, 825 (Ct. App. 1993) aff'd 188 Wis. 2d 613 (1994). Questions of law are reviewable *ab initio* and are properly subject to judicial substitution of judgment. §227.57(5), Stats.; American Motors Corp. v. ILHR Dep't,

---

[3] This restriction applies to the drawing contained in the brief of R.W. Docks.

101 Wis. 2d 337, 353-54 (1981). Nevertheless, courts accord varying degrees of deference to an administrative agency's interpretation of a statute it has been legislatively charged to administer. Carrion Corp. v. DOR, 179 Wis. 2d 254, 264-65 (Ct. App. 1993), *citing* West Bend Educ. Ass'n v. WERC, 121 Wis. 2d 1, 11-12 (1984). The general rule in Wisconsin is that "the construction and interpretation of a statute adopted by the administrative agency charged with the duty of applying it is entitled to great weight." Blackhawk Teachers' Fed'n Local 2308 v. WERC, 109 Wis. 2d 415, 421 (Ct. App. 1982), citing Beloit Education Ass'n v. WERC, 73 Wis. 2d 43, 67 (1976). The highest degree of deference should be paid to an agency's interpretation of a statute when that interpretation "is of long standing" or "entails its expertise, technical competence and specialized knowledge," or when "through interpretation and application of the statute, the agency can provide uniformity and consistency in the field of its specialized knowledge." Carrion, at 264-5. If the agency's interpretation is one among several reasonable interpretations that can be made which are consistent with the purpose of the statute, a court must affirm the agency's choice. DeLeeuw v. ILHR Dept., 71 Wis. 2d 446, 449 (1976). Courts, however, should not defer to an agency's interpretation of a statute when the court finds that the agency's interpretation "directly contravenes the words of that statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis." Carrion, 179 Wis. 2d. at 265, *citing* Lisney v. LIRC, 171 Wis. 2d 499, 506 (1992). This standard of review is subject to various exceptions, as for instance, when the agency is interpreting a statute for the first or nearly the first time, or if there is no rational basis for the agency's conclusions. Blackhawk, at 422, citing Beloit, at 67-68.

DISCUSSION

1. Denial of Dredging Contract and Permit to Construct Floating Docks.

Ignoring, for the moment, the petitioner's arguments concerning estoppel, the basic issue before the ALJ was whether to grant to R.W.Docks a contract to dredge 15,000 cubic yards of material, and a permit to construct floating docks. The DNR asserts that it has the authority to prohibit dredging in the marina area, and to require structure permits.

The dredging contract was required pursuant to §30.20, Stats.[4] Under that statute, a contract is mandatory before dredging can begin, and the DNR may only enter into such contracts "whenever consistent with public rights." §§30.20(1)(a) and 30.20(2)(a), Stats. The permit for the docks was required under §§30.12, Stats.[5] Under that statute,

---

[4] 30.20 Removal of material from beds of navigable waters

(1) Unlawful removal.

(a) No person may remove any material from the bed of any navigable lake or from the bed of any outlying waters of this state without first obtaining a contract as provided in sub. (2).

. . . .

(2) Contracts for removal.

(a) The department, whenever consistent with public rights, may enter into contracts on behalf of the state for the removal of any material from the bed of any navigable lake or any of the outlying waters, and for the lease or sale of the material. Every contract shall contain such conditions as may be necessary for the protection of the public interest and the interests of the state and shall fix the compensation to be paid to the state for material so removed . . . . No contract entered into under this paragraph may run for a longer period that 5 years.

. . . .

[5] §30.12 Structures and deposits in navigable waters prohibited; exceptions; penalty.

(1) General prohibition. Except as [otherwise provided], unless a permit has been granted by the department pursuant to statute or the legislature had otherwise authorized structures or deposits in navigable waters, it is unlawful:

a riparian owner must obtain from the DNR a permit before depositing any material or placing any structure upon the bed of any navigable waters. §30.12(1), Stats. The DNR may issue a permit to an applicant to build or erect such a structure if it finds that the structure does not materially obstruct navigation and is not detrimental to the public interest. §30.12(2), Stats.

After a hearing, and after the parties were given an opportunity to submit briefs, both the contract and the permit were denied. Because the arguments for each action overlap in many respects, the contract and the permit will be discussed together.

R.W. Docks asserts that "the hearing was conducted with a total misunderstanding of the applicable law and was therefore a waste of time and money [because t]he Department and the [ALJ] proceeded on the mistaken belief that if the proposed dredging had any impact whatsoever on the environment it could be proscribed." (Memorandum of Law of Petitioner R.W. Docks & Slips, p.6). R.W. Docks asserts that until 1983, it was routinely granted dredging contracts by the DNR in order to facilitate development of the marina. R.W. Docks contends that the DNR was overly concerned for the emergent weedbed, even though the weedbed only came into existence because of the

---

(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.

(2) The department . . . may grant to any riparian owner a permit to build or maintain for the owner's use a structure otherwise prohibited under sub. (1), if the structure does not materially obstruct navigation or reduce the effective flood flow capacity of a stream and is not detrimental to the public interest . . . .

construction of the breakwater.[6] R.W. Docks contends that dredging would remove only a minor part of the emergent weedbed because the main part of the weedbed is outside the proposed dredging area.

R.W. Docks also asserts that the marina has been developed on an incremental basis, and that no structure permits had ever previously been required by the DNR. (Memorandum of Law of Petitioner R.W. Docks & Slips, p. 3; Reply Memorandum, pp. 1-2) Whether or not the DNR had previously required such permits is not germane to this court's review of the ALJ's ruling.[7] Section 30.12(1), Stats. contains a general prohibition against placing any structures on the beds of navigable waters. Neither party disputes the ALJ's findings and conclusions that Lake Superior is navigable, and that the floating docks are "structures" within the meaning of the §30.12, Stats.[8]

---

[6] Starting at page 8 of its Reply Memorandum, R.W. Docks makes a number of comments on the testimony of various witnesses. Although apparently sincere, these comments do not suffice to point to error on the part of the ALJ. R.W. Docks alludes to attempts to "engender a snail darter response" or invoke the "snail darter syndrome", concedes that the one unique mussel "must be lonely" but asserts that there is no scientific evidence that it is either threatened or endangered, and "comments that one or more witnesses simply "likes to look at weeds."

[7] The petitioner's assertion assumes that docks 1 to 3 are equivalent to proposed docks 4 and 5. The record does demonstrate that §30.12 permits had been required for certain parts of the marina, although not for the older docks. Exhibit 62, a letter dated July 12, 1971, from the DNR to Mr. Robert F. Holmgren, contains a reference to a §30.12, Stats. permit. Exhibit 65 (Record, Ex. 1-4), contains a copy of a §30.12, Stats. permit issued May 12, 1972, for construction of the breakwater. A further review of the record revealed no §30.12 permits for construction of docks 1 through 3; Exhibit 1-8 contains a reference that seems to imply they were built sometime before 1979 (see also, §30.122, Stats.) Whether or not permits were required in the past does not render the current permit process or requirment somehow per se invalid.

[8] §30.01 Definitions.

. . . .

In its Reply Memorandum addressed to the ALJ, dated April 8, 1996, R.W. Docks asserted that pursuant to the DNR's own administrative regulations contained in Wis. Adm. Code, sec. NR 326.05,[9] no structure permit is required. It seems clear that the proposed development would not be included in the provisions contained in §326.05, and R.W. Docks asserted that neither did the provisions of 326.04(1) or (9) apply because the piers would neither extend beyond the line of navigation (326.04(1)), nor be maintained with a screen (326.04(9)). These NR regulations were referenced in the Petition for Review filed in this case. Wis. Adm. Code, sec. NR 326.04, reads in pertinent part:

> (1) Except as provided un sub. (2) or (8), piers shall not extend into the water from the shoreline beyond the line of navigation or the length of the boat using the pier unless a need

---

(5) "Pier" means any structure extending into navigable waters from the shore with water on both sides, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft . . . .

(8) "Wharf" means any structure in navigable waters extending along the shore and generally connected with the uplands throughout its length, built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft.

Wis. Adm. Code, sec. NR 326.03 Definitions.

(7) "Pier" as defined in s. 30.01(5), Stats., means any structure extending channelward from the shore with water on both sides, built or maintained for the purpose of providing a berthing or mooring place for watercraft . . . .

[9] Wis. Adm. Code, sec. NR 326.05:

Riparians intending to construct solid piers, rock-filled cribs or similar types and size devices used as foundations, piers which extend beyond established pierhead lines, or piers not conforming to s. NR 326.04(1) or (9), shall apply for permits.

> can be demonstrated by the riparian that boats using the pier require a greater depth of water
> . . . .
> (8) Piers associated with marinas . . . . shall not extend into the water from the shoreline beyond the line of navigation unless a permit is obtained under s. 30.12(2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee.[10]

In its Finding of Fact No. 8, the ALJ stated that "in the event that this decision is overturned on appeal, a permit condition requiring compliance with sec. NR 326.04(08), Wis. Adm. Code, should be established." The record does not demonstrate that the proposed development is a public marina in the sense intended by the statute (it is in fact developed as a condominium, and it appears that slips are made available to the public by leases offered by individual slip owners—an arrangement more properly described as a private rental agreement). Although Mr. Holmgren testified that R.W. Docks did not intend to construct piers extending beyond the length of the boat using them (Trans. p. 508), that appears only to be true for the "finger" piers that are attached to the main dock section, but not to the main dock sections themselves (for example, according to the proposed plans, Dock 5, which would add an additional 50 slips to the marina, would extend 90 feet into the bay, and its main section is 8 feet wide) There is no evidence that the pier length is necessary merely to obtain a greater depth of water (presumably that is why the dredging contract is necessary in the first place). Referring to Exhibit 1-6, the DNR also points out that certain of those provisions "were specifically

---

[10] The note to section 8 states that "As an example, the use of such an extended pier shall not be conditioned upon membership in a private club or organization, purchase of a parcel or property, or purchase of a boat.

enforced against the petitioner in 1971-2;" and would conceivably have provided R.W. Docks with notice of the requirements. Therefore, the conclusion of the ALJ requiring a permit under §30.12, Stats., is not clearly erroneous.

R.W. Docks asserts that additional error was committed when its mitigation offer was "totally rebuffed if not ridiculed." (Id. at 7-8.) Again, R.W. Docks does not point to, and this court cannot find, any authority that would mandate consideration, let alone acceptance, of a party's mitigation offer under the structure/dredging permitting processes. The court also notes that there is no evidence in the record indicating that the mitigation offers were ever the subject of ridicule.[11]

Without citing to the record, R.W. Docks asserts that the ALJ's finding of fact that "'[t]he record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project compels a decision in favor of Petitioner." It is not clear whether the Petitioner believes this assertion is intended to apply to the dredging contract, to the structure permit application, or to both. The cited statement was contained in Finding of Fact No. 6. In that finding the ALJ went on to say that:

> [t]here is no dispute that the area has long supported aquatic vegetation that has provided habitat for fishery and other aquatic life . . . . While the historical development of the site is interesting, the applicant overstates the

[11] According to the petitioner's own memorandum, this offer amounted to a demand for compensation, and in the alternative, mitigation on the condition that the petitioner could name the wildlife refuge that would ostensibly be created. (Petitioner's Memorandum of Law, p. 8, citation to record omitted). The record, particularly the transcript of the testimony, seems indicative of a more reasoned and balanced offer of mitigation on the part of the petitioner.

> significance of the breakwater to the present balancing between public and private rights at the project site . . . .

R.W. Docks contends that the degree of harm to public lands is "extremely small." According to R.W. Docks, the ALJ "made no effort to determine the degree of harm to public lands" and erred by failing to consider the "social value" of the marina, and its suitability to the site. (Memorandum of Law of Petitioner R.W. Dock & Slips. at 7-8). However that is not the test required by the statute, and R.W. Docks is unable to point to, and this court cannot find, any statutory or common law authority for the petitioner's contention that the ALJ was required to consider the "social value" of the marina, or that the terms public rights and interest should be read so narrowly. Public rights and interests in navigable waters are not limited to navigation or riparian rights. The terms are more expansive, and encompasses a whole range of interests and rights, both incremental and cumulative, and including scenic and ecological values. *See, e.g.,* State v. Bleck, 114 Wis. 2d 454 (1983); and Just v. Marinette County, 56 Wis. 2d 7 (1972).

It is also critical to remember that both the issuance of a permit and the grant of a contract are within the discretion of the DNR. The permit requires a finding that structure is not detrimental to the public interest. §30.12(2), Stats. Similarly, the dredging contract must be consistent with public rights. §30.20(2), Stats. The ALJ stated in Finding of fact No. 6:

> The issue with respect to the 30.12, Stats. permit is whether it would be "not detrimental to the public interest" in navigable waters under the present circumstances. The issue with respect to the [30.20, Stats.] dredging contract is whether approval of the contract would be "consistent" with public rights.

> Given the environmental significance of the currently existing weed bed, public rights in public waters would be detrimentally impacted by the loss of rare fish and wildlife habitat, and destruction of macroinvertebrate, mussels and zooplankton communities. Dredging if this environmentally rich area would not be consistent with public rights in maintaining and preserving the state's natural resources. (See: Findings 7-10).

The ALJ found that the proposed project would have detrimental impacts to fishery values (Finding of Fact 7), would result in the destruction of a rare environmental resource with high aesthetic values (Finding of Fact 8), would have a detrimental impact on wetland functional values (Find of Fact 9), and poses significant cumulative impacts to the natural and public resource of Lake Superior (Finding of Fact 10). The ALJ separately found that the proposed construction of Dock 5 would interfere with the rights or interests of other other riparians (Finding of Fact 14). R.W.Docks was afforded an opportunity to challenge all of the findings.

Based on the above findings, the ALJ concluded that the proposed docks did not fall within any of the permit exceptions contained in §30.13, Stats,[12], and would impact

---

[12] §30.13 Regulation of wharves, piers and swimming rafts; establishment of pierhead lines.

(1) Construction allowed without permit under certain circumstances. A riparian proprietor may construct a wharf or pier in a navigable waterway extending beyond the ordinary high-water mark or an established bulkhead line in aid of navigation without obtaining a permit under s. 30.12 if all of the following conditions are met:

(a) The wharf or pier does not interfere with public rights in navigable waters.

on the rights of the public and of neighboring riparians (Conclusion of Law 2). The ALJ also concluded that the proposed dredging project would not be consistent with public rights in navigable waters. (Conclusion of Law 7). Based on these and other conclusions, the proposed dredging contract and proposed marina expansion were denied.

Taken together, none of R.W.Docks' assertions make it appear that error was committed. The court finds that as documented by the ALJ, these findings are supported by substantial evidence in the record and the conclusions are not erroneous as a matter of law.

2. Did the hearing comport with the directions contained in the Circuit Court Order.

R.W.Docks contends that "This case . . . is governed by the Circuit Court's Order as modified by the Court of Appeals Decision." According to R.W. Docks, that order required that there be a full airing and a resolution of certain disputed and unresolved issues that had been asserted by R.W. Docks. Those issues were:

> 1) That the aquatic growth in question was created as a result of petitioner's earlier installation of a breakwater; 2) That ongoing

---

(b) The wharf or pier does not interfere with rights of other riparian proprietors.

(c) The wharf or pier does not extend beyond any pierhead line . . . .

(d) The wharf or pier does not violate any ordinances enacted under sub. (2).

(e) The wharf or pier is constructed to allow the free movement of water underneath and in a manner which will not cause the formation of land upon the bed of the waterway.

. . . .

> siltation will adversely affect the weedbed, absent dredging; 3) That additional dredging will positively affect the entrophication [sic] in the area; and 4) That the weeds in question do not constitute rare "open water" vegetation.
>
> (Record, Ex. 1-13, p. 12)

The case now before this court is not governed by the prior court order, but by Chapter 227. Nevertheless, the court will address R.W. Docks' concerns. Reading the court order in its entirety reveals that the basis for that portion of the court order requiring a full hearing was the court's concern that because the permit process did not involve a contested hearing the petitioner had not been given an opportunity to submit countervailing evidence—the court therefore found the record to be insufficient to conduct a meaningful administrative review. In contrast, the present Petition for Judicial Review has come following a contested hearing, with an extensive record that demonstrates that the parties were given ample opportunities to submit evidence and countervailing evidence.

Regarding the first issue, whether the aquatic growth in question was created as a result of petitioner's earlier installation of a breakwater, the ALJ found that "The record as a whole supports the reasonable inference that construction of the existing breakwater has facilitated the growth of emergent plants in the area of the proposed project," but then concluded that the historical development of the site was not determinative of the balancing between public and private rights at the site. (Finding of Fact 6) As the ALJ's citations reveal, this conclusion is supported by the record and is not clearly erroneous.

Regarding the second issue, whether the ongoing siltation will adversely affect the weedbed, absent dredging, the evidence was at best inconclusive. The record

demonstrates that R.W. Docks presented the testimony of Carlos Torro, an expert on sedimentation to discuss the effects of dredging in general, and of Randy Duncan to discuss the aquatic plant community (Mr. Duncan conducted what he terms a visual survey from the shoreline, see also, Transcript at pp 113-14).

Regarding the third issue, whether dredging will positively affect the "entrophication" in the area, the court could discern no testimony offered by R.W. Docks on this issue. Neither did it appear to be a factor critical to the ALJ's decision.

Regarding the fourth issue, that the weeds in question do not constitute rare "open water" vegetation, it is clear that the testimony of the petitioner's witness, Mr. Duncan was in no way dispositive of this issue. In contract, Emmet Judziewicz and others testified that the community was uncommon in Lake Superior. (Transcript at pp. 260-261, 263). There was extensive discussion on the issue of whether or not particular species were formally designated as threatened, endangered, or of special concern, and if so, whether the designation was on a state or federal level. Numerous witnesses testified that although some of the individual species contained in the community were common to other inland lakes in Wisconsin, that the vegetative community was quite rare in Lake Superior, and was a valuable ecological resource.

R.W. Docks separately asserts that the ALJ erred by ignoring the court's directive regarding estoppel.

Pursuant to the remand order issued by Dane County Circuit Court, the DNR was also directed to "take testimony and make findings regarding its prior knowledge of petitioner's plans to dredge the area in question prior to issuing a breakwater permit and any reliance by petitioner on

Departmental representations." (Memorandum Decision and Order, Dane County Circuit Court, 86-CV-2508, p 13)

The record unequivocally demonstrates that testimony was taken and other evidence was introduced on the issue of estoppel. On behalf of R.W. Docks, Mr. Holmgren testified on the issue (see, e.g., Trans. pp. 513-522), and both R.W. Docks (Memorandum of R.W. Docks & Slips In Support of Applications, 3-NW-84-101/3-NW-95-04022, pp. 9-10) and the DNR (Department's Response Brief, 3-NW-84-101/3-NW-95-04022, pp. 6-7) briefed the issue to the ALJ.

The DNR concedes that the ALJ "did not adjudicate petitioner's estoppel argument," because, it asserts, the ALJ found that R.W. Docks has "'overstated the significance of that history to the balancing of public and private rights at the project site that the relevant legal standards require."

It is true that the petitioner faces a stiff burden in asserting a claim for estoppel. Not only must it prove the elements necessary for estoppel,[13] but it must also be able to surmount the DNR's assertion that its actions were a proper exercise of the State's police powers, against which a claim for estoppel may not be applied. State v. City of Green Bay, 96 Wis. 2d 195, 201 (1980). Nevertheless, it is not the provence of this court but of the ALJ to make such findings. Accordingly, pursuant to §227.57(7), Stats., and consistent with the prior circuit court order, this matter is remanded back to the ALJ to make the necessary findings on the issue of estoppel.

---

[13] These are: 1) action or nonaction on the part of the DNR which 2) induces reliance by R.W. Docks 3) to the detriment of R.W. Docks. State v. City of Green Bay, 96 Wis. 20, 195 (1980).

ORDER

For the reasons stated above, the court makes the following order:

Although the administrative decisions of the Department of Natural Resources denying R.W. Docks a structure permit and a contract to dredge, are support by substantial evidence in the record, and are not clearly erroneous as a matter of law, the ALJ failed to make any findings regarding estoppel. Therefore, this case is remanded to the ALJ for the narrow purpose of making findings on the issue of estoppel.

So ordered.

29th day of May 1997.

By the Court

/s/ Stuart A. Schwartz
Stuart A. Schwartz
Circuit Judge
Branch 15

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

Application of Port Industries, Inc., for a Permit to Construct a Solid Breakwater Structure on the Bed of Lake Superior, Town of Bayfield, Bayfield County	)))))	3-WR-430

FINDINGS OF FACT AND PERMIT

Port Industries, Inc., 15908 Wayzata Boulevard, Wayzata, Minnesota 55391, filed an application with the Department on December 12, 1968, for a permit under section 30.12, Statutes, to build and maintain a breakwater structure in Lake Superior, Bayfield County. Permit granted.

Pursuant to due notice, hearing was held at Washburn on March 13, 1969, before Examiner Maurice H. Van Susteren.

Appearances:

Port Industries, Inc., by

Robert F. Holmgren, vice president
Wayzata, Minnesota

Walter L. Holmgren, director
Minneapolis, Minnesota

L. D. Craig, construction superintendent
Bayfield

In Support:

Town of Bayfield, by

Walter Bainingham, town chairman
Bayfield

Carl Carlson
Waupun

As Interest May Appear:

Department of Natural Resources,
Division of Fish, Game and Enforcement, by

Lewis Posekany, chief,
biological engineering section
Madison

Of the Staff of the Division of Environmental Protection

FINDINGS OF FACT

1. Port Industries, Inc., on December 12, 1968, filed an application with the Department for a permit under section 30.12, Statutes, to construct and maintain a breakwater in Lake Superior in section 22, township 50 north, range 4 west, Town of Bayfield, Bayfield County. On February 5, 1969, a copy of the notice of hearing was mailed to the clerks of Bayfield County and the Town of Bayfield, which are the county and town wherein the proposed structure is located.

2. Port Industries, Inc., owns a tract of land described as:

> Beginning at the point on the shoreline of Shequamegon Bay of Lake Superior where the same is intersected by the north and south quarter section line of section 32, township 50 north, range 4 west; thence north along said quarter section line to its

intersection with the south line of the right-of-way of State Trunk Highway No. 13; thence southwesterly following the southerly line of said right-of-way to its intersection with the east line of government lot 3 of said section 22; thence north along the west line of government lot 3 to the south line of said section 22; thence east along the south section line of said section 22 to its intersection with the shore of Chequemegon Bay; thence northeastly following the shoreline to the point of beginning.

3. The above-described property abuts Lake Superior, which is navigable in fact.

4. The applicant proposed to construct a breakwater . . . . feet long nearly parallel with and 600 feet from the shoreline as shown in Exhibit No. 3. It will be constructed of steal ore . . . . together and filled with sand and rock, which will be supported by riprap. The top of the breakwater will be at an elevation 604.0 feet, ... Great Lakes Datum.

5. The purpose of the proposed structure is to provide a protected harbor for a marina.

6. The applicant is financially capable of constructing, maintaining, and removing the structure, if it is deemed . . . .

7. The proposed structure will not materially obstruct existing navigation and will not be detrimental to the public interest.

CONCLUSIONS OF LAW

1. The applicant, Port Industries, Inc., is a riparian owner within the meaning of section 30.12, Statutes.

2. The proposed facility described in the findings of fact constitutes a structure within the meaning of section 30.12, Statutes.

3. The Department has authority under section 30.12, Statutes, and in accordance with the foregoing findings of fact, to issue a permit for the construction and maintenance of the said structure.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, Port Industries, Inc., a permit under section 30.12, Statutes, for the construction of a structure as described in the foregoing findings of fact, subject, however, to the provisions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. The permit granted herein shall expire on May 2, 1971, if the structure is not completed before such date.

3. A copy of this permit shall be kept at the site at all times during the construction of the structure.

4. The applicant shall waive any objections to the free and unlimited inspection of the premises, site, or facility at any time by any employe of the Department for the purpose of investigating the construction, operation, and maintenance of the project.

Dated at Madison, Wisconsin, May 19, 1969

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES
For the Secretary
By /s/Thomas G. Fangos

State of Wisconsin\DEPARTMENT OF NATURAL RESOURCES

L.P. Voigt
Secretary

Box 450
Madison, Wisconsin 53701

May 19, 1972

IN REPLY REFER TO: 3520-2
3530-3

3-WR-1265

Mr. J. C. Fox, U.S. Coast Guard, Chief, Ninth Coast Guard District, 1240 East 9th Street, Cleveland, Ohio 44199
Mr. Robert F. Holmgren, President, Port Industries, Inc., 400 Shelard Plaza, Mpls., Minn.
Port Industries, Inc., Box 299 A, Route 1, Bayfield, Wisconsin 54814
Port Industries, Inc., c/o Mr. Gary L. Bakke, Attorney, New Richmond, Wisconsin 54017
Mr. Jacob Heinlein, Zoning Administrator, Courthouse, Washburn, Wisconsin 54891
Mr. Arthur A. Oehmcke, Director, West Central District, Eau Claire, Wisconsin
Mr. Lester Voigt, Secretary, Department of Natural Resources, 14th Floor, Pyare Square Building, Madison, Wisconsin
Mr. J. R. Smith, Administrator, Division of Forestry, Wildlife and Recreation, Pyare Square Building, Madison, Wisconsin
Director, Bureau of Legal Services, 13th Floor, Pyare Square Building, Madison, Wisconsin
Mr. James W. Taylor, Pyare Square Building, Bureau of Information and Education, 12th Floor, Madison, Wisconsin
Mr. G. J. Barber, Soil Conservation Board, Soils Building, University of Wisconsin, Madison, Wisconsin

Mr. Walter Scott, 14th Floor, Pyare Square Building, Madison, Wisconsin
Mr. John Wyngaard, 110 East Main Street, Madison, Wisconsin 53703
Mr. Richard Kienitz, Milwaukee Journal News Bureau, Two West Mifflin Street, Madison, Wisconsin 53703
Attorney General, State Capitol, Madison, Wisconsin
Public Intervenor, Attorney General's Office, State Capitol, Madison, Wisconsin
Mr. Cyril Kabat, Scientific Areas Council, 9th Floor, Pyare Square Building, Madison, Wisconsin

Investigation on Motion of the Department of Natural Resources of an Alleged Illegal Deposit of Material on the Bed of Lake Superior and an Unlawful Removal of material from the Bed of Lake Superior in the Town of Bayfield, Bayfield County, by Port Industries, Inc.

Gentlemen:

We enclose copy of Findings of Fact, Conclusions of Law and Order issued in the above entitled matter.

Very truly yours,
Division of Environmental Protection
/s/
Thomas G. Frangos
Administrator

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

Investigation on Motion of the Department of Natural Resources of an Alleged Illegal Deposit of Material on the Bed of Lake Superior and an Unlawful Removal of Material from the Bed of Lake Superior in the Town of Bayfield, Bayfield County, by Port Industries, Inc.	)	3-WR-1265

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On April 4, 1972, the Department of Natural Resources issued a notice of investigation and hearing into the alleged illegal deposit of material on the bed of Lake Superior and the alleged illegal removal of material from the bed of Lake Superior in the Town of Bayfield, Bayfield County, by Port Industries, Inc.

Upon due notice being given, hearing was held pursuant to Section 30.03, Wisconsin Statutes, on April 18, 1972, at Spooner, Wisconsin, before Examiner Donald R. Murphy.

Appearances:

DEPARTMENT OF NATURAL RESOURCES
Division of Forestry, Wildlife & Recreation
and the
Division of Environmental Protection
by
Edward D. Main, Attorney
Madison

RESPONDENT: PORT INDUSTRIES, INC.
by
Gary L. Bakke, Attorney
New Richmond

FINDINGS OF FACT

THE DEPARTMENT FINDS:

1. At the hearing, a stipulation was entered into between the Department of Natural Resources, Divisions of Forestry, Wildlife & Recreation and Environmental Protection and the respondent, Port Industries, Inc. which provides:

"1. That Port Industries, Inc. is the owner of property located in the southeast quarter, southwest quarter, section 22, township 50 north, range 4 west, Town of Bayfield, Bayfield County, Wisconsin.

2. That during the 1971 construction season a contractor acting as an agent for Port Industries, Inc. removed material and deposited material on the bed of Lake Superior.

3. That Lake Superior is navigable in fact.

4. That no permits for the deposit on and removal of materials from the bed of Lake Superior were granted to Port Industries, Inc. by the Department of Natural Resources pursuant to Chapter 30, Wisconsin Statutes.

5. That said construction activities involving the bed of Lake Superior were done in violation of Section 30.20 and 30.12, Wisconsin Statutes. Under Section 30.15, Wisconsin Statutes, every violation of Section 30.12 constitutes an obstruction of navigable waters, and each day during which the obstruction exists is a separate offense which may result

in a forfeiture of $50.00 per day. A violation of Section 30.20 of the Wisconsin Statutes may result in a forfeiture of not more than $1,000.00.

6. That Port Industries, Inc. agrees to pay to the State of Wisconsin forthwith a forfeiture of $1,000.00 pursuant to subsection 30.20 (1) (c), Wisconsin Statutes, and subsections 30.15 (1) (d) and 30.15 (3), Wisconsin Statutes.

7. That this stipulation is authorized by Section 227.07, Wisconsin Statutes, and the forfeiture shall be deposited with the state treasurer in accordance with Section 30.03, Wisconsin Statutes.

8. That the Department of Natural Resources will issue an order based upon this stipulation, thereby precluding the Division of Environmental Protection and the Division of Forestry, Wildlife and Recreation of the Department of Natural Resources from any further action to obtain forfeitures in this matter upon payment of the stipulated forfeiture. The Department shall not, however, be precluded from reopening this proceeding upon complaint of said divisions if the necessary permits are not obtained to legalize the already completed construction, as well as any future construction nor shall the Department of Natural Resources be precluded from reopening this proceeding if existing violations of Chapter 30 are not abated to the satisfaction of said divisions of the Department of Natural Resources."

2. Formal application has been made by Port Industries, Inc. to the Department of Natural Resources for the necessary permits under Chapter 30, Wisconsin Statutes.

3. Prior to the conclusion of the hearing, Port Industries, Inc. deposited with the hearing examiner a check in the amount of $1,000.00, payable to the State of Wisconsin Department of Natural Resources.

4. The above-described payment is adequate consideration for dismissal of this matter.

CONCLUSIONS OF LAW

1. Section 227.07, Wisconsin Statutes, states, "Prior to the final disposition of any contested case, all parties shall be afforded opportunity for full, fair public hearing after reasonable notice, but this shall not preclude the informal disposition of controversies by stipulation, agreed settlement, consent order, or default."

2. The Department of Natural Resources has authority to dismiss the proceedings herin, and an order should be issued dismissing the action.

ORDER

IT IS THEREFORE ORDERED that the proceedings herein be and hereby are dismissed with prejudice.

Dated at Madison, Wisconsin, May 19, 1972

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES
For the Secretary

By /s/
Thomas G. Frangos, Administrator
Division of Environmental Pro

DEPARTMENT OF NATURAL RESOURCES
PERMIT MAILING LIST

COPIES SENT TO:

Department of Natural Resources Personnel:
Water Management Supervisor-NWD, Spooner

U.S. Army Corps of Engineers:
Ben Wopat, Chief, Regulatory Branch, 190 Fifth Street East, St. Paul, MN 55101-1638

Applicant:
Mr. Robert Holmgren, Managing Agent, R.W. Docks & Slips, 18855 Ridgewood Rd., Wayzata, MN 55391

Agent:
Mr. Bruce Rasmussen, Rasmussen, Duckson & Carlson, Ltd., 2116 Second Ave South, Minneapolis, MN 55404

Zoning Administrator:
Richard Spotts, Bayfield County Courthouse, 117 East 5th Street, Washburn, WI 54891

Town Clerk:
Jane Hauser, P. O. Box 652, Bayfield, WI 54814

Adjacent Landowners:
John Maloney, 4400 Curve Ave, Edina, MN 55424

Bob DeChantel, Condo 511, Port Superior Village, Bayfield, WI 54814-0277

Port Superior Village Association, c/o Ann Locey, President, 168 E. 6th, Apt. 4202, St.Paul, MN 55101

Port Superior Marina Association, c/o Phil Peterson, Operations Manager, Rt 1 Box 717, Bayfield, WI 54814

Surveillance Officer:

Mike Vogelsang, DNR, Box 589, 141 S. 3rd Street, Bayfield, WI 54814

Original and copies of this document were deposited for mailing to the addressee and indicated copies in the US mail at Brule, WI,
on 7/3/95 by /s/

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
BRULE AREA HEADQUARTERS
P.O. Box 128
Ranger Station Road
Brule, Wisconsin 54820
TELEPHONE 715-372-4866
TELEFAX 715-372-4836

June 29, 1995

3500
3-NW-1995-04010

Mr. Robert Holmgren
R.W. Docks & Slips
18855 Ridgewood Rd.
Wayzata, MN 55391

Dear Mr. Holmgren:

We have reviewed your application for a permit to construct an extension to Dock 4 in the Port Superior Marina, Bayfield County. You will be pleased to know your application is approved with a few limitations.

Attached are two copies of your permit which lists the conditions that must be followed. In addition, I have included a copy of our findings of fact and conclusions of law and your rights to appeal our action. One copy of the permit is for your records and the other is to be kept for reference at the project site. Please read the permit conditions carefully so that you are fully aware of what is expected of you. Conditions number 2 through 5 are especially important. Condition number one requires that you notify Conservation Warden Mike Vogelsang before starting construction and again after your project is completed.

Please note that your extension of dock 4 is limited to 44 feet from the existing dock. After lengthy discussions with all

involved parties over this application, the Department determined that this length of dock, in combination with a wood piling anchor for stability, would provide you with your two additional boat slips without the need for a time-consuming and costly hearing procedure. This dock structure and configuration is also consistent with the other docks within the Port Superior Marina.

If you have any questions about your permit, please feel free to call me at 715-372-4866. And remember, your permit is not valid until you notify Mr. Vogelsang of your intention to begin construction.

Sincerely,

/s/

Duane J. Lahti
Water Management Specialist

Attach.

cc: Bruce Rasmussen
Michael Cain - LC/5

STATE OF WISCONSIN
DEPARTMENT OF NATURAL
RESOURCES

DOCK PERMIT
3-NW-1995-04010

R.W. Docks & Slips is hereby granted under Section 30.12, Wisconsin Statutes, a permit to construct a floating dock extension on the bed of Lake Superior, located in Government Lot 03 of Section 22, T50N, RO4W, Bayfield County, subject to the following conditions:

1. The permittee shall notify conservation Warden Mike Vogelsang, DNR, Box 589, 141 S 3rd Street, Bayfield, Wisconsin, 54814 or he can be called at 715-779-3780 before starting construction and again not more than 5 days after the project is complete.

2. This permit authorizes the construction and placement of a floating dock extension 44 feet in length and 8 feet in width with one fingerpier 4 feet in width and 32 feet in length extending off the easterly side of Dock 4 creating two boat slips. The pier will be constructed of treated wood decking and stringers supported by a foam-filled polyethylene float system and anchored with wood pilings for stability.

3. The maximum length of the main dock extension shall be specifically limited to 44 feet from the existing dock. Oak wood piling shall be used for stability at the end of the pier.

4. Any upland areas that are disturbed during construction shall be stabilized as necessary to prevent sedimentation of the waterway.

5. Flotation materials shall be free of chemicals and other deleterious residues or substances.

6. This permit expires on November 1, 1996 if the project is not completed before then. No construction may begin or continue after this date unless a new permit or permit extension is granted in writing by the Department.

7. This permit does not authorize any work other than what you specifically describe in the application and plans, and as limited by conditions of this permit. No changes in the project or plans may be made without prior written approval of the Department. The dock shall be constructed according to the plans shown as Attachment 1.

8. The permittee is responsible for obtaining any permit or approval required by municipal, town or county zoning ordinances or by the U.S. Army Corps of Engineers before starting the project.

9. The permittee shall allow free and unlimited access to the project site at any time to any Department employee who is investigating the project's construction, operation or maintenance.

10. The Department may change or revoke this permit if the project obstructs navigation or becomes detrimental to the public interest.

11. A copy of this permit shall be kept at the project site at all times until the project has been completed.

12. Acceptance of this permit and beginning the project means that you have read, understand and agree to follow all conditions of this permit.

Dated at Brule, WI June 29, 1995

STATE OF WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
For the Secretary

By /s/
Duane J. Lahti
Water Management Specialist
NWD - Brule

FINDINGS OF FACT (Facts which were considered in making this decision.)

1. R.W. Docks & Slips has completed filing an application for a permit to construct a floating dock extension on the bed of Lake Superior located in Government Lot 03 of Section 22, T50N, R04W, Bayfield County.

2. The project will consist of construction of a floating dock extension 44 feet in length and 8 feet in width with one fingerpier 4 feet in width and 32 feet in length extending off the easterly side of Dock 4 creating two boat slips. The pier will be constructed of treated wood decking and stringers supported by a foam-filled polyethylene float system. The pier will be anchored with wood pilings.

3. The applicant, on March 23, 1995 filed an application for a permit to extend Dock 4 by 48 feet with one finger pier on the easterly side of Dock 4 creating slips 197 and 199.

4. On May 23, 1995 Port Superior Marina Association (PSMA) filed a timely letter of objection stating the

opposition to the 48 foot extension due to inconsistency with other docks in the marina and intrusion into the navigation channel. There was no objection to the 44 foot extension.

5. On May 26, 1995 the applicant, R.W. Docks & Slips filed a response and rebuttal to the May 23 letter from PSMA requesting that the permit be issued for the 48 foot dock extension without hearing.

6. One June 9, 1995, a site inspection was conducted by the Brule Area DNR Water Management Specialist at Port Superior Marina with Mr. Robert Holmgren of R.W. Docks & Slips and Mr. Phil Peterson of Port Superior Marina Association present.

7. After the site inspection and discussions with both parties, the Department has determined that it is in the best interest of all parties and the public to issue the permit for a 44 foot long dock extension with one finger pier 32 feet in length as stated in Finding of Fact 2. A wooden piling can be used to stabilize the dock which is consistent with the other existing docks in Port Superior Marina.

8. The Department has completed an investigation of the project site and has evaluated the project as described in the application and plans.

9. The proposed project will not impact wetlands.

10. The Department and the applicant have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Section 30.12, Wisconsin Statutes, and NR 102, 103, 115, 116, and NR 150 Wisconsin Administrative Code.

11. The Department has determined that the grant or denial of this permit would not be a major state action significantly affecting the quality of the human environment.

CONCLUSIONS OF LAW (Legal reasons why the Department can issue permits.)

1. The Department has authority under the above indicated Statutes and Administrative Rules, to issue a permit for the construction and maintenance of this project.
2. The Department has complied with Section 1.11, Wisconsin Statutes.

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that Wisconsin Statutes and Administrative Rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision pursuant to Sections 227.52 and 227.53, Wisconsin Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

To request a contested case hearing pursuant to Section 227.42, Wisconsin Statutes, you have 30 days after the decision is mailed, or otherwise served by the Department, to serve a petition for a hearing on the Secretary of the Department of Natural Resources. The filing of a request for a contested case hearing is not a prerequisite for judicial review and does not extend the 30-day period for filing a petition for judicial review.

This notice is provided pursuant to Section 227.48(2), Wisconsin Statutes. This decision was mailed on the date indicated on the mailing list.

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
Box 450
Madison, Wisconsin 53701

L.P. Voigt
Secretary

December 30, 1968

Robert F. Holmgren, Vice President
Port Industries, Inc.
15908 Wayzata Boulevard
Wayzata, Minnesota 55391

Re: Contract for the Removal of Material from Navigable Waters

Dear Mr. Holmgren:

We are enclosing the original of contract 3-WR-138.45 authorizing Port Industries, Inc., to dredge materials from the bed of Lake Superior, Bayfield County. It requires signature and is to be returned to this office immediately.

We are also enclosing two copies of a form of bond which meets the Department's requirements. Only one copy need be filed with the Department. It is our thought that the surety company may wish to retain the extra copy for its file.

A payment of $225.00 is due at this time for the estimated 20,000 cubic yards of material to be removed.

When we receive the signed contract, an acceptable bond, and the remittance, copies of the contract will be sent to you. The contract will then be in force.

Your attention is called to the fact that you must also obtain authorization for this work from the U.S. Army Corps of Engineers.

Further, the granting of this dredging contract is not to be construed as an assurance that the application for a structure at this location will be granted.

Very truly yours,
Division of Environmental Protection

/s/
Gerald P. Wallin, Acting Chief
Water Regulation Section

GPW:mwl
Encl.
cc: Bureau of Engineering
Corps of Engineers

3. The applicant proposes to construct a solid earth filled structure 220 feet long and 90 feet wide placed behind a timber wall, as shown in the application.

4. The purpose of the proposed structure is to create a harbor for the mooring of boats.

5. The applicant is financially capable of constructing, maintaining, or removing the structure if it should be found necessary to do so.

6. The proposed structure will not materially obstruct existing navigation or reduce the effective flood flow capacity of a stream, and will not be detrimental to the public interest.

7. The proposed structure will not adversely affect water quality nor will it increase water pollution in Lake Superior.

CONCLUSIONS OF LAW

1. The applicant is a riparian owner within the meaning of section 30.12, Statutes.

2. The proposed facility described in the findings of fact constitutes a structure within the meaning of section 30.12, Statutes, and in accordance with the foregoing findings of fact, to issue a permit for the construction and maintenance of the said structure.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicant, a permit under section 30.12, Statutes, for the construction of a structure as described in the foregoing findings of fact, subject, however, to the conditions that:

1. The authority hereby granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. The applicant shall waive any objection to the free and unlimited inspection of the premises, site, or facility at any time by any

STATE OF WISCONSIN BAYFIELD COUNTY
CIRCUIT COURT

R.W. DOCKS & SLIPS,

Plaintiff,

v. Case No. 990-CV-1

STATE OF WISCONSIN and
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Defendants.

SECOND SUPPLEMENTAL AFFIDAVIT OF ROBERT F. HOLMGREN

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Robert F. Holmgren, being duly sworn and on his oath, deposes and says of his own personal knowledge:

1. I am the managing agent of plaintiff and have been since the inception of the Pike's Bay Marine project in Bayfield County, Wisconsin in 1968.

2. Plaintiff is not in the business of operating the Port Superior Marina. The operation of the marina is the purview of the condominium association.

3. Two hundred one of plaintiff's condominium slips/units have been sold and they are freely transferable

from one owner to another. The owner of a condominium unit has a right to exclude others from his unit.

4. I have carefully reviewed plaintiff's construction records and have calculated that the approximate present value of the improvements are:

Slips	$1,005,000
Breakwater	1,000,000
Seawall	500,000
Dredging	400,000
Clubhouse	450,000
Restaurant and Offices	450,000
Shop and Equipment	200,000
Store	50,000
Heads and Showers	25,000
Movilla	40,000
Crane	70,000
Fueling Center	40,000
Service Dock	25,000
Sewer	50,000
Water Wells	18,000
Tennis Courts	50,000
Storage and Parking Areas	700,000
Blacktop	80,000
Swimming Pool	100,000
Quay	200,000
Real Estate	2,000,00
Perpendicular Breakwall	240,000
Legal Fees	307,000
	$8,000,000

5. I have carefully reviewed my client's sales records and have determined that the approximate average sale price for the 201 condominium boat slips/units sold is $10,000.

5. From the foregoing, I conclude that plaintiff expenditures for marina improvements exceeded plaintiff's revenue from condominium sales by over $1,000,000,.

Further affiant sayeth naught save that he gives this affidavit in opposition to defendants' motion for summary judgment.

/s/
Robert F. Holmgren

Subscribed and sworn to before me
this 19th day of August, 1999.

/s/Lee A. Sanford
Notary Public